No. 88-23-CFX
Status: GRANTED

Title: Lauro Lines s.r.l., Petitioner
v.
Sophie Chasser, et al.

Docketed:
July 6, 1988

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Connell,Raymond A., Dougherty,Daniel J.

Counsel for respondent: Eisen,Morris J., Fisher,Jay D., Larsen Jr.,William P.

Entry	Date	Note	Proceedings and Orders
19	Feb 24 1988		Reply brief of petitioner Lauro Lines s.r.l. filed.
1	Jul 6 1988	G	Petition for writ of certiorari filed.—
3	Aug 1 1988		Order extending time to file response to petition until August 19, 1988.
4	Aug 5 1988		Brief of respondents Ilsa and Lisa Klinghoffer in opposition filed.
5	Aug 8 1988		Order further extending time to file response to petition until September 12, 1988.
6	Aug 11 1988		The above further extension of time applies to all respondents.
7	Aug 18 1988		Brief of respondents Chasser, et al. in opposition filed.
8	Sep 14 1988		DISTRIBUTED. October 7, 1988
9	Oct 4 1988	X	Reply brief of petitioner Lauro Lines s.r.l. filed.
10	Oct 11 1988		Petition GRANTED.
			**********
11	Nov 23 1988		Brief of respondents Chandris Cruise Lines, et al. in support of petition filed.
12	Nov 25 1988		Joint appendix filed.
13	Nov 25 1988		Brief of petitioner Lauro Lines s.r.l. filed.
15	Dec 19 1988		Order extending time to file brief of respondent on the merits until January 12, 1989.
16	Jan 11 1989		Order further extending time to file brief of respondent on the merits until January 27, 1989.
17	Jan 19 1989		Record filed.
		*	Certified copy of original record and proceedings, box, received.
18	Jan 25 1989		Brief of respondents Chasser, et al. filed.
20	Feb 24 1989		Reply brief of petitioner Lauro Lines s.r.l. filed.
22	Mar 8 1989		SET FOR ARGUMENT, APRIL 17, 1989. (2nd CASE)
23	Mar 15 1989		CIRCULATED.
24	Apr 17 1989		ARGUED.

88-23 (1)

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

v.

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RAYMOND A. CONNELL
29 Broadway
New York, New York 10006
(212) 943-3980
Counsel of Record

JOHN R. GERAGHTY
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980
Of Counsel

QUESTION PRESENTED FOR REVIEW

Is an order of a United States District Court denying enforcement of a foreign forum selection clause appealable as a collateral final order?

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* The caption of the case in this Court contains the names of all parties. Petitioner does not have any corporate parent, subsidiary, or affiliate.

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STATUTES AND RULES CITED

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

v.

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a/ RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit

officially reported at 844 F.2d 50 (2d Cir. 1988) is printed in the Appendix at 1a-14a. The decision of the United States District Court for the Southern District of New York dictated in open court on October 21, 1987 and entered on October 23, 1987, not officially reported, is printed in the Appendix at 15a-18a.

JURISDICITONAL STATEMENT

The order below sought to be reviewed is dated April 7, 1988. It was entered on April 7, 1988.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATEMENT OF THE CASE

Petitioner Lauro Lines s.r.l. ("Lauro Lines") is the successor by merger to Achille Lauro ed Altri-Gestione

m/n "Achille Lauro" s.n.c. ("ALA") and Societa de Fatto Achille Lauro ed Altri Gestione Armatoriale Nava Noleggiate ("FAL"), partnerships whose offices were located at Via C. Columbo 45, Naples, Italy. ALA owned the Italian-flag ACHILLE LAURO. Since February, 1982 both partnerships were in Italian reorganization proceedings. On July 28, 1986 all members of the Lauro group, including these partnerships, were merged into one company, i.e., Lauro Lines s.r.l. The merger was deemed retroactive to February, 1982.

On September 14, 1984 ALA time chartered the ACHILLE LAURO to a joint venture composed of FAL and Chandris S.A. (Piraeus). The Joint Venture operated the Vessel as a cruise ship. Tickets were sold to passengers in all areas of

the world. Chandris S.A. (Piraeus) was responsible for the United States market. It retained Chandris, Inc. in New York to distribute tickets to interested travel agents, and others.

In October, 1985 the ACHILLE LAURO was hijacked by terrorists while on a cruise in the Mediterranean. The cruise commenced at Genoa, Italy, and it was scheduled to terminate at the port. The ticket held by each passenger contained the following provision.

> Art. 31 -- VENUE OF JUDICIAL PROCEEDINGS -All controversies that may arise directly or indirectly in connection with or in relation to this passage contract, must be instituted before the judicial authority in Naples, the jurisdiction of any other authority being expressly renounced and waived . . . .

Beginning in November, 1985 certain American passengers (and the representative of a deceased passenger) brought a

series of suits in the United States District Court for the Southern District of New York against Lauro Lines, Chandris, and Crown Travel Service, Inc. ("Crown"). Jurisdiction was based upon diversity of citizenship, 28 U.S.C.A. § 1332, and, the actions were also within the District Court's admiralty jurisdiction. 28 U.S.C.A. § 1333.*

A passenger ticket is a maritime contract. Foster v. Cunard White Star Ltd., 121 F.2d 12 (2d Cir. 1941); Murray v. Cunard S.S. Co., 235 N.Y. 162, 139

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* The Chasser action (85 Civ. 9708) (diversity of citizenship); the Klinghoffer action (85 Civ. 9303) (diversity of citizenship and the Death on the High Seas Act, 28 U.S.C. § 761 et seq.); the Saire action (86 Civ. 6332) (diversity of citizenship); the Meskin action (86 Civ. 4657) (no jurisdictional allegation in the Complaint).

N.E. 228 (1923). Therefore, even where jurisdiction of the district court is based upon diversity, it is the general maritime law of the United States as stated by the federal courts that governs the effect and construction of the ticket's terms and conditions, including its forum selection clause. Janson v. Swedish American Line, 185 F.2d 212, 216 (1st Cir. 1950); De Nicola v. Cunard Line, Ltd., 642 F.2d 5, 7 n.2 (1st Cir. 1981); Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955); Mulvihill v. Furness Withy & Co., 36 F.Supp. 201, 205 (S.D.N.Y. 1955); Caruso v. Italian Line, 184 F.Supp. 862, 863 (S.D.N.Y. 1960); Lubick v. Travel Services, 573 F.Supp. 904, 906 (D.V.I, 1983); see also Lerner v. Karageorgis, 66 N.Y.2d 479, 485-86, 497 N.Y.S.2d 894-95, 488 N.E.2d 824 (1985)

("In maritime cases, state courts must apply Federal law 'to secure a single and uniform body of maritime laws' . . .").

On November 17, 1986 Lauro Lines filed a motion for an order dismissing all actions against it on the grounds of lack of New York in personam jurisdiction, the ticket forum selection clause, and forum non conveniens. Defendants Chandris and Crown joined the motion to dismiss on the basis of the forum clause. Plaintiffs in all actions opposed the motion.

On October 21, 1987 following oral argument, the District Court denied Lauro Line's motion. With respect to the forum selection clause, the District Court stated, in part:

> Under the cases the touchstone is whether the ticket reasonably communicates the importance of its contract provisions. In this case, that is a close question. It is one

> upon which reasonable jurists, lawyers, and laymen might differ.

App. 17a.

On October 23, 1987 the Order denying enforcement of the forum clause was entered by the District Court.

On November 20, 1987 Lauro Lines filed its Notice of Appeal from that portion of the Order denying enforcement of the foreign forum selection clause. Appellate jurisdiction was invoked under the collateral final order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Chandris and Crown filed similar Notices of Appeal. All cases were consolidated for purposes of the appeal.

On January 29, 1988 plaintiffs filed a motion to dismiss the appeal for want of appellate jurisdiction.

On April 7, 1988 the United States Court of Appeals for the Second Circuit granted the motion for an order dismissing the appeal for lack of appellate jurisdiction. Recognizing a conflict among the circuits on the question, the Second Circuit held orders denying enforcement of a forum selection clause are not appealable as collaterally final orders:

> We have not previously considered the applicability of the Cohen doctrine to the denial of a motion to dismiss on the basis of a contractual forum-selection clause. Some of our sister circuits have concluded that such a denial is immediately appealable, see Farmland Industries v. Frazier-Parrott Commodities, 806 F.2d 848, 850-51 (8th Cir. 1986); Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 193-97 (3d Cir.)("Coastal Steel"), cert. denied, 464 U.S. 938 (1983), while others have concluded that it is not, see Louisiana Ice Cream Distributors v. Carvel Corp., 821 F.2d 1031, 1032-34 (5th Cir. 1987); Rohrer, Hibler & Replogie, Inc. v. Perkins, 728 F.2d 860, 862 (7th Cir.), cert. denied, 469 U.S. 890

> 1984). We are persuaded that the latter view is correct because we believe the refusal to dismiss on forum selection grounds is not "effectively unreviewable on appeal from a final judgment."

844 F.2d at 53.

REASONS FOR GRANTING THE WRIT

Rule 17.1(a) of the Supreme Court Rules states that one of the character of reasons considered by the Court in determining whether to exercise its discretion to review by writ of certiorari is:

> When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . .

Five Courts of Appeals have considered the question whether an order denying enforcement of a forum selection clause is appealable as a collaterally final order, and they are in conflict.

Appeals are generally restricted to "final decisions of the district courts."

28 U.S.C. § 1291. However, the exceptions permitted by 28 U.S.C. § 1292 for certain interlocutory orders, decrees and judgments, indicates an intention "to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545 (1949).

In Cohen, supra, the Court held appealable an order denying a corporate defendant in a diversity action the benefit of a statute of the forum state requiring defendants in stockholder derivative suits to post security for expenses. It did so, "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require considera-

tion with it." 337 U.S. at 546-47. The Court explained:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

337 U.S. at 546.

The United States Court of Appeals for the Third Circuit in Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir.), cert. denied, 464 U.S. 938 (1983), held an order denying enforcement of a foreign forum selection clause appealable as a collaterally final order. The order finally determined the question. 709 F.2d at 195. A "contractual clause selecting either a judicial or an arbitral

forum for the resolution of disputes establishes a legal right which is analytically distinct from the rights being asserted in the dispute to which it is addressed." Id. at 195. It is not subject to effective review on appeal from a final judgment. Id. at 196.

It is now firmly established in the Third Circuit that "orders denying a pre-trial motion to enforce a forum selection clause are reviewable by courts of appeals." General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 355 (3rd Cir. 1986) (order of United States District Court for the Virgin Islands denying enforcement of a Maryland forum clause appealable as a collateral order); accord, In re Diaz Contracting, Inc., 817 F.2d 1047 (3d Cir. 1987) (order of United States District

Court for District of New Jersey denying enforcement of New York forum clause appealable as a collateral order).

The United States Court of Appeals for the Seventh Circuit in Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860 (7th Cir. 1984), found an order denying enforcement of a domestic forum selection clause without its appellate jurisdiction. However, the Court indicated the result might be different had the case involved a foreign forum clause:

> In contrast to Coastal Steel where the applicable law (English or American) would differ depending on the forum in which the case was tried, the controlling law in the instant case . . . will be the same whether it is tried in the Northern District of Illinois or the Circuit Court of Cook County.

728 F.2d at 864.

A petition for writ of certiorari was filed in Rohrer, supra. The petition was

denied, but Mr. Justice White in a dissent joined by Mr. Justice Blackmun, stated:

> There is no meaningful distinction between this case and Coastal Steel. Indeed, the Seventh Circuit recognized as much when it declined even to attempt to distinguish the holding of the Coastal Steel majority. That the forum selection clause in Coastal Steel specified a foreign court while the one at issue here designates a domestic forum is of little moment: in both cases, denying immediate review would simply postpone the decision whether the contract requires litigation in another forum until after a trial on the merits. In neither case is the order more or less meaningfully reviewable on appeal from final judgment than in the other. The conflict created by the Third Circuit's decison in this case is inescapable, and this petition should be granted to resolve it. Accordingly, I dissent from the denial of certiorari.

469 U.S. 890 (1984).

The conflict among the circuits has now expanded.

The United States Court of Appeals for the Eighth Circuit has held an order by a

district court in Missouri denying enforcement of a forum clause calling for resolution of disputes in Cook County, Illinois appealable as a collateral order. Farmland Industries, Inc. v. Frazier - Parrott Commodities, Inc., 806 F.2d 848 (8th Cir. 1986). The order conclusively determined the disputed question, it was important to the parties "because it conclusively determines in which jurisdiction the suit must be tried," 806 F.2d at 850, and:

> From a practical viewpiont the district court's order denying application of the clause will be unreviewable after final judgment. After a final determination is made on the merits it will be too late effectively to reveiw the present order because the contractual right to trial in Illinois will have been lost. Granted, defendants could raise this issue after a final determination on the merits and possibly gain a new trial in Illinois. However, a Missouri trial and appeal is not what was contemplated by the parties

> when they signed the contract; what was contemplated is a single trial resolution of disputes in Illinois. Denying defendants immediate appeal of this issue will effectively deprive them of a contractual right.

806 F.2d at 850-51.

The United States Court of Appeals for the Fifth Circuit has indicated an order denying enforcement of a forum selection clause does not qualify as an appealable collaterally final order, Louisiana Ice Cream Distributors v. Carvel Corp., 821 F.2d 1031 (5th Cir. 1987), and the United Sttes Court of Appeals for the Second Circuit in the decision below found an order denying enforcement of a forum clause without its appellate jurisdiction.

Therefore, the order below would qualify as a collaterally final order in the Third and Eighth circuits; it would

not qualify as a collaterally final order in the Second Circuit; since a foreign forum selection clause, not a domestic forum clause, is involved, appellate jurisdiction might be accepted in the Seventh Circuit; and, the probable result in the Fifth Circuit is difficult to ascertain.*

In this very case, while an order of the United States District Court for the Southern District of New York to enforce

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* The Fifth Circuit in Louisiana Ice Cream Distributors v. Carvel Corp., 821 F.2d 1031 (5th Cir. 1987) at 1033 n.2 understood the Third Circuit's decision in Nascone v. Spudnuts, Inc., 735 F.2d 763 (3d Cir. 1984) to question Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir.), cert. denied, 464 U.S. 938 (1983). This was not so. See General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352 (3d Cir. 1986); In re Diaz Construction Co., Inc., 817 F.2d 1047 (3d Cir. 1987).

the ticket's forum selection clause has been held not appealable as a collaterally final order by the United States Court of Appeals for the Second Circuit, an order of the United States District Court for the District of New Jersey denying enforcement of the identical ticket forum clause in a suit brought other passengers of the ACHILLE LAURO, was deemed within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit, and that Circuit has heard argument on the merits.*

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* On April 7, 1986, Mildred Hodes and her husband Frank, passengers on the ACHILLE LAURO, brought suit against Lauro Lines and others in the United States District Court for the District of New Jersey, Docket No. 86-1381 (HAA). By his Report and Recommendation dated May 7, 1987, the Honorable G. Donald Haneke, United States Magistrate, recommended the New Jersey action be dismissed on among other grounds, the ticket forum

Forum selection clauses are widely used in transactions of all sorts, especially those involving parties from different countries. They provide an important substantive right by "limit[ing] all uncertainty as to the nature, location, and outlook of the forum in which [parties of differing nationalities], might find themselves." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 n.15 (1972). Absent some cogent reason for not doing

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(footnote continued)

selection clause. By Decision dated December 30, 1987, and Order entered January 4, 1988 the Honorable Harold A. Ackerman, United States District Court Judge for the District of New Jersey, declined enforcement of the forum selection clause. On February 2, 1988 Lauro filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit. On June 22, 1988 argument on the merits was heard by the Third Circuit.

so, this Court has repeatedly indicated they should be enforced. Bremen, supra; Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Stewart Organization, Inc. v. Ricoh Corporation, 56 U.S.L.W. 4659 (U.S. June 20, 1988).

The question of whether orders denying enforcement of forum selection clauses qualify as appealable collaterally final orders has been considered by five circuits. The results are in conflict. As recently stated by Mr. Justice Kennedy in connection with the enforcement of a forum selection clause, "the federal judicial system has a strong interest in the correct resolution of these questions." Stewart, supra, 56 U.S.L.W. at 4662. Surely, the first step towards the correct resolution of questions concerning the enforcement of forum selection clauses is

to end the ever expanding conflict among the circuits on the question of appellate jurisdiction to hear an immediate appeal from district court orders denying their enforcement.

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Dated: July 1, 1988

Respectfully submitted,

RAYMOND A. CONNELL
Attorney for Petitioner
29 Broadway
New York, New York 10006
(212) 943-3980

JOHN R. GERAGHTY
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980

Of Counsel

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1987

(Argued: February 16, 1988 Decided: April 7, 1988)

Docket Nos. 87-9081, -9083, -9085, -9087, -9089, -9091

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE,

Plaintiffs-Appellees,

—v.—

ACHILLE LAURO LINES, THE LAURO LINES s.r.l., FLOTTO ACHILLE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, S.N.C. ACHILLE LAURO ED ALTRI-GESTIONE MOTONAVE ACHILLE LAURO IN AMMINISTRAZIONE STRAORDINARIA, COMMISSARIO OF THE FLOTA ACHILLE LAURO IN AMMINISTRAZIONE STRAORDINARIA, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS,

Defendants,

LAURO LINES s.r.l., CHANDRIS CRUISE LINES, CLUB ABC TOURS, INC., CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Defendants-Appellants.

Before:

KEARSE and MAHONEY, *Circuit Judges*, and GLASSER, *District Judge.**

Motion to dismiss appeals from an interlocutory order of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, denying motion of defendant Lauro Lines s.r.l. to dismiss actions on ground that contract provision required suit to be brought in Italy.

Motion granted.

MORRIS J. EISEN, P.C., New York, New York (Arthur M. Luxemberg, New York, New York), *for Plaintiffs-Appellees Sophie Chasser, Anna Schneider, Viola Meskin, Seymour Meskin, Sylvia Sherman, Paul Weltman, and Evelyn Weltman.*

* Judge of the United States District Court for the Eastern District of New York, sitting by designation.

WOLF, BLOCK, SCHORR & SOLIS-COHEN, Philadelphia, Pennsylvania, (Fischer, Kagan, Ascione & Zaretsky, New York, New York), *for the Klinghoffer Plaintiffs-Appellees.*

WILLIAM P. LARSEN, Jr., New York, New York, (Newman, Schlau, Fitch & Burns, P.C., New York, New York), *for the Saire Plaintiffs-Appellees.*

RAYMOND A. CONNELL, New York, New York, (Healy & Baillie, New York, New York), *for Defendant-Appellant Lauro Lines s.r.l.*

KIRLIN, CAMPBELL & KEATING, New York, New York (Daniel J. Dougherty, New York, New York), *for Defendant-Appellant Chandris Cruise Lines.*

RUBIN, HAY & GOULD, P.C., Framingham, Massachusetts (Rodney E. Gould, Framingham, Massachusetts, A. George Koevary, Parker & Duryee, New York, New York), *for Defendant-Appellant Crown Travel Service, Inc., d/b/a Rona Travel and/or Club ABC Tours.*

KEARSE, *Circuit Judge*:

Defendants Lauro Lines s.r.l. ("Lauro"), *et al.*, appeal from an interlocutory order of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, denying Lauro's motion to dismiss the present actions on the basis of forum-selection clauses in

the ticket agreements between Lauro, owner of the cruise ship ACHILLE LAURO, and plaintiffs, who were or represent passengers on the ACHILLE LAURO. The clauses provided that any suit by passengers against Lauro was to be brought in Naples, Italy. Plaintiffs have moved to dismiss the appeals for lack of appellate jurisdiction. For the reasons below, we grant the motion.

BACKGROUND

Plaintiffs, citizens and residents of the United States, were passengers, or are the executrices of the estates of persons who were passengers, aboard the ACHILLE LAURO on a Mediterranean cruise in October 1985 when it was hijacked by terrorists of the Palestine Liberation Organization ("PLO"). The passengers were held captive and terrorized by the PLO, and they have brought the present actions, informally consolidated below, to recover damages for physical and psychological injuries and for the wrongful death of Leon Klinghoffer.

Lauro moved to dismiss the actions on several grounds, including the ground that a forum-selection clause in each passenger ticket required plaintiffs to bring these suits in Naples. The district court denied the motion to dismiss. With respect to the forum-selection clause, the court stated that the touchstone for enforceability was "whether the ticket reasonably communicates the importance of its contract provision." Transcript dated October 21, 1987 ("Tr."), at 3. The court described the "cover reference" to the forum clause as "unobtrusive" and noted that the clause itself appeared in "tiny type." *Id.* at 4. Further, the court noted that though the ticket provided that the passenger " 'specifically approves' " certain clauses, the forum-selection clause was not among them. *Id.* at 5. In

addition, though there was a place for the passenger's signature at the bottom of the contract, apparently none of the tickets was signed. In sum, while the district court termed the question of adequacy of notice a close one as to which reasonable persons might differ, *id.* at 4, it concluded that "as a whole . . . the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States," *id.* at 5. Accordingly, the court denied the motion to dismiss.

Lauro and two other defendants have appealed the court's refusal to dismiss on the basis of the forum-selection clause. Plaintiffs have moved to dismiss the appeals on the ground that the denial of the motion for dismissal is an interlocutory order that is not appealable under 28 U.S.C. § 1291 (1982). Lauro, which made no effort to have the court's denial on forum-selection grounds certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) (1982), argues that that denial is a final order insofar as it determines where the litigation will be conducted and that it is immediately appealable under § 1291 pursuant to the *Cohen* doctrine, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). We conclude that the order is not appealable and we therefore dismiss the appeals.

DISCUSSION

Section 1291 gives the courts of appeals jurisdiction to review "final decisons" of the district courts. 28 U.S.C. § 1291. The district court's denial of a motion to dismiss, which leaves the controversy pending, is not, technically, a final decision within the meaning of this section. *See, e.g.*,

Catlin v. United States, 324 U.S. 229, 236 (1945). The *Cohen* doctrine, on which Lauro here relies, is a judicially created exception that allows an immediate appeal from certain orders that are collateral to the merits of the litigation and that cannot be reviewed adequately after final judgment. As the Supreme Court has described it,

> [t]he collateral order doctrine is a "narrow exception" . . . whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. *See Helstoski v. Meanor*, 442 U.S. 500, 506-508 (1979); *Abney v. United States*, 431 U.S. 651, 660-662 (1977). To fall within the exception, an order must at a minimum satisfy three conditions: It must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgement."

Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430-31 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

The narrowness of the collateral order doctrine reflects judicial deference to Congress's preference against piecemeal appeals, as well as the recognition that judicial efficiency may be promoted by the denial of interim review because some interlocutory orders will have become moot by the time a final judgment is entered, either because the order is modified prior to final judgment, or because the party disadvantaged by the interlocutory order prevails in the action, or for some other reason. *See, e.g., Stringfellow v. Concerned Neighbors In Action*, 107 S. Ct. 1177, 1184 (1987) ("*Stringfellow*"); *Mitchell v. Forsyth*, 472 U.S. 511, 544 (1985) (Brennan, *J.*, concurring in part and

dissenting in part). The Court has made it clear that when an interlocutory order will be reviewable on appeal from a final judgment, the mere fact that ultimately it might appear that an interim reversal would have been more efficient, or that the party against whom the order is entered may have difficulty in persuading the appellate court to reverse after a final judgment, is not a reason to grant immediate review. In *Stringfellow*, for example, a party that had been allowed to intervene in an action on condition, *inter alia*, that it not assert new claims sought to appeal immediately from the imposition of conditions on its intervention. Though it conceded that it would have the right to review of the conditions upon appeal from the final judgment, it argued that the practicalities of complex and protracted litigation would make an appellate court reluctant to vacate the judgment on the basis of an erroneous intervention order. The Court was unpersuaded that this consideration should lead to disregard of the *Cohen* requirement of effective unreviewability on appeal from final judgment. As the Court succinctly stated in *Richardson-Merrell Inc. v. Koller*, "the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress." 472 U.S. at 436.

This Court too has generally been reluctant to apply the *Cohen* doctrine in an expansive fashion, "lest this exception swallow the salutory 'final judgment' rule." *Weight Watchers v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972); *see, e.g., Richardson Greenshields Securities, Inc. v. Lau*, 825 F.2d 647, 651 (2d Cir. 1987); *Carlenstolpe v. Merck & Co.*, 819 F.2d 33, 35-36 (2d Cir. 1987); *United States Tour Operators Ass'n v. Trans World Airlines*, 556 F.2d 126, 128 (2d Cir. 1977). For example, our decisions indicate that this doctrine does not permit

immediate appeals pursuant to § 1291 from orders denying motions to dismiss on grounds of improper venue, *see A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 442-44 (2d Cir. 1966), or forum non conveniens, *see Carlenstolpe v. Merck & Co.*, 819 F.2d at 35-36.

We have not previously considered the applicability of the *Cohen* doctrine to the denial of a motion to dismiss on the basis of a contractual forum-selection clause. Some of our sister circuits have concluded that such a denial is immediately appealable, *see Farmland Industries v. Frazier-Parrott Commodities*, 806 F.2d 848, 850-51 (8th Cir. 1986); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 193-97 (3d Cir.) ("*Coastal Steel*"), *cert. denied*, 464 U.S. 938 (1983), while others have concluded that it is not, *see Louisiana Ice Cream Distributors v. Carvel Corp.*, 821 F.2d 1031, 1032-34 (5th Cir. 1987); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 862 (7th Cir.), *cert. denied*, 469 U.S. 890 (1984). We are persuaded that the latter view is correct because we believe the refusal to dismiss on forum-selection grounds is not "effectively unreviewable on appeal from a final judgment."

The Third Circuit in *Coastal Steel* came to the conclusion that the district court's refusal to enforce a contractual forum-selection clause was unreviewable on appeal from a final judgment because 28 U.S.C. § 2105 (1982) provides that "[t]here shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." We do not agree that § 2105 makes a refusal to enforce a forum-selection clause unreviewable after final judgment or, if it did have that effect, that it would allow such a refusal to be reviewed at an earlier stage.

If § 2105 were to be taken literally and did preclude review of such denials after final judgment, we would be at a loss to understand how there could properly be interim review any more than review after final judgment, for "no reversal" has a rather categorical flavor. *Coastal Steel*'s rationale was that § 2105 could not have been intended to preclude interim review pursuant to the collateral order doctrine because that doctrine had not been devised in 1789 when the first progenitor of § 2105 was adopted. *See* 709 F.2d at 196. We find this rationale unpersuasive for two reasons. First, if Congress has indeed made a certain type of order immune from review, the courts simply are not free to ignore the congressional limitation. *See, e.g., Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976) (order remanding removed action to state court on grounds provided in 28 U.S.C. § 1447(c) (1982) is made unreviewable by *id.* § 1447(d), and thus may not be reviewed). Second, the *Cohen* doctrine, which interprets finality within the meaning of § 1291, is concerned with the timing of review; it assumes reviewability in principle and focuses on the practical difficulties entailed by postponement of review. The doctrine has not, to our knowledge, been used to review at any time an order of a type that Congress has made unreviewable in principle.

Further, assuming that § 2105 applies to forum-selection motions, if the section were taken literally, it would forbid review of even the granting of a motion to dismiss on forum-selection-clause grounds, for that section does not forbid reversals just of *denials* of motions in abatement; it forbids reversals of any nonjurisdictional "ruling" upon a matter in abatement. We have seen no authority supporting the proposition that such a dismissal, which would, of course, be a final decision in the litigation, is unreviewable.

It appears to us, however, that § 2105 is not to be taken literally. Commentators have called it "one of the most commonly ignored provisions of the Judicial Code," noting that its "most important feature . . . is certainly its disuse." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3903, at 412, 413 (1976). This seems an accurate observation, for assuming, as did *Coastal Steel*, 709 F.2d at 196, that "matters in abatement" means any (nonjurisdictional) ground for dismissal that would leave the parties free to pursue the suit in another forum, that category would appear to encompass matters such as motions to dismiss on grounds of improper venue or forum non conveniens; yet both grants and denials of those motions are commonly thought to be reviewable on appeal from final judgment. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (review of grant of forum non conveniens motion); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (same); *In re Air Crash Disaster*, 821 F.2d 1147, 1166-68 (5th Cir. 1987) (en banc) (reviewing denial of motion to dismiss for forum non conveniens), *petition for cert. filed* (U.S. Nov. 6, 1987) (No. 87-750); *Carlenstolpe v. Merck & Co.*, 819 F.2d at 35-36; *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967) (review of denial of motion to dismiss for improper venue); *Gill v. United States*, 184 F.2d 49, 50-51 (2d Cir. 1950) (same); *Corke v. Sameiet M.S. Song of Norway*, 572 F.2d 77 (2d Cir. 1978) (reviewing denial of motion to transfer venue); *Central Valley Typographical Union, No. 46 v. McClatchy Newspapers*, 762 F.2d 741, 744-46 (9th Cir. 1985) (reviewing both grant by first district court of a motion to transfer venue and denial by transferee district court of a motion to transfer to a third district).

We see no reason why denial of a motion to dismiss on the basis of a contractual forum-selection clause should be any less subject to correction upon appeal from a final judgment than are denials of motions for dismissal on grounds of improper venue or of forum non conveniens. The Supreme Court has held that a forum-selection clause in a commercial agreement "should control absent a strong showing that it should be set aside." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *see Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Such a clause thus grants an important right that should be recognized unless the party resisting enforcement shows the clause to be unreasonable. We would think, therefore, that if the district court has erroneously failed to enforce such a clause, its order may be reversed when the judgment is finally appealed.

Perhaps the most pertinent case decided by our Court is *Avis Rent A Car System, Inc. v. Garage Employees Union, Local 272*, 791 F.2d 22 (2d Cir. 1986), an appeal from a final judgment enforcing an arbitration award. The ground of the appeal was that the district court had refused to enforce a contract provision that required arbitrators to be selected in a certain way from among a certain group. Noting that "analogous contractual forum selection clauses are ordinarily binding and enforceable unless the party resisting them . . . shows them to be unreasonable," *id.* at 26, and ruling that no showing of prejudice was required by the party seeking enforcement of the clause, we reversed the judgment enforcing the award entered by the "wrong" arbitrator, and we remanded for entry of an order directing the parties to place their dispute before an arbitrator called for by the contract. Plainly, therefore, in the context of arbitration clauses, which are a type of forum-selection clause, this Court has viewed the

refusal to enforce as a matter that is fully reviewable on appeal from the final judgment.

We reject Lauro's suggestion that the right granted in a forum-selection clause, if enforceable, must be vindicated immediately or it is lost. It is a right to have the binding adjudication of claims occur in a certain forum; it is not a right of the same magnitude as a constitutional right to be free from double jeopardy, *see Abney v. United States*, 431 U.S. at 660-62, or the right to be free of any trial whatever, *see Mitchell v. Forsyth*, 472 U.S. at 530 (qualified governmental immunity); *Helstoski v. Meanor*, 442 U.S. at 506-08 (Speech and Debate immunity). The rights to escape any trial or any further trial are rights that would be lost unless vindicated at a pretrial stage. In contrast, the right to secure adjudication in a particular forum is not lost simply because enforcement is postponed. And, as noted above, the fact that postponing review may entail additional litigation expense has been explicitly rejected by the Supreme Court as a basis for immediate appeal.

Since we conclude that the district court's denial of Lauro's motion to dismiss on the basis of the forum-selection clause in the passenger tickets will be effectively reviewable on appeal from final judgment, we need not decide whether the first two *Cohen* requirements are met. We conclude that the order at issue here is not appealable under the collateral order doctrine.

Our recent decision in *Karl Koch Erecting Co. v. New York Convention Center Development Corp.*, Nos. 87-7306, *et al.*, slip op. 1431, 1434-36 (2d Cir. Feb. 3, 1988), does not suggest a contrary result. In *Karl Koch*, we held, relying on *Pelleport Industries v. Budco Quality Theatres*, 741 F.2d 273, 278 (9th Cir. 1984), that a district court's enforcement of a contractual forum-selection clause, by remanding a removed action to state court, was appealable under the *Cohen* doctrine. Unlike a refusal to enforce, with which we are presented here, the *Karl Koch* enforcement finally decided the forum-selection issue in a way that made the decision unreviewable on appeal from the final judgment simply because the litigation was no longer proceeding in federal court.

Finally, we reject Lauro's fall-back suggestion that we have jurisdiction of these appeals under 28 U.S.C. § 1292(a)(1) (1982). That section allows appeals of interlocutory orders that grant or deny (or otherwise deal with) injunctions. We do not regard the denial of a motion to dismiss on forum-selection grounds as the equivalent of the denial of a motion for an injunction within the meaning of § 1292(a)(1). Further, even if such a denial were tantamount to the denial of injunctive relief, we would grant the present motion to dismiss, for the Supreme Court "has made it clear that not all denials of injunctive relief are immediately appealable; a party seeking review also must show that the order will have a " 'serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" *only* by immediate appeal.' " *Stringfellow*, 107 S. Ct. at 1184 (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955))) (emphasis ours). *See also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 56 U.S.L.W. 4243 (U.S. Mar. 22, 1988). Since, for the reasons discussed above, we have concluded that meaningful appellate review of the present order will be available after final judgment, assuming that judgment is adverse to Lauro, § 1292(a)(1) provides no basis for immediate appeal of the present order.

CONCLUSION

We have considered all of Lauro's arguments in support of immediate appealability and have found them to be without merit. The appeals are dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9303

October 21, 1987
12:55 p.m.

LEON KLINGHOFFER, ET AL.,

Plaintiffs,

v.

ACHILLE LAURO, ET AL.,

Defendants.

Before:

HON. LOUIS L. STANTON,

District Judge

DECISION

APPEARANCES

JAY D. FISCHER,
MORRIS EISEN,

Attorney for Plaintiffs

LAWRENCE W. SCHILLING,
RAYMOND A. CONNELL,
DANIEL J. DOUGHERTY,
RODNEY GOULD,

Attorneys for defendants

[2] (In open court)

THE COURT: Thank you, gentlemen. And thank you all for excellent briefs on the points involved in this motion.

They have been expressed in writing and orally with clarity and vigor and style, and admirably cover the great variety of aspects involved.

In ruling on the motion in a somewhat laconic fashion, I do not wish to be taken as disregarding any of the areas presented in the papers or orally, but do so because I feel no jurisprudential purpose would be served by expanding my explanation beyond the points which I regard as decisive.

As to jurisdiction over Lauro, this question arises under New York's Long Arm Statute, which requires a showing of a continuous and systematic course of doing business here such as to warrant a finding of Defendant Lauro's presence in this jurisdiction.

Mere solicitation of business through an agent is not enough, although if solicitation is present, in any substantial degree, very little more is necessary to the conclusion that business is being done.

The argument presented on this motion, since it is common ground that solicitation of business was being done, lies in the fact that Lauro's agent for sales [3] and marketing here was Chandris, Inc., which had authority to confirm some cabins on the Achille Lauro, and which had been at least instrumental in part in obtaining for Crown Travel its authority to confirm other space.

In addition, Chandris, Inc., has been responsible for effecting changes in the Achille Lauro's itinerary, and in some degree to the accommodations of the vessel itself. Chandris, Inc., issued tickets for confirmed space, for money which was received and deposited in an account it maintained for Lauro's name, and Chandris, Inc., also handled at least on various occasions the adjustment of passenger complaints.

There are other activities alluded to, including the volume of passengers which was booked and the amount of money involved, but taken as a whole, those of Chandris, Inc.'s, activities are in themselves sufficient to bring Lauro within the

jurisdiction of this court, and that ground of the motion is rejected.

I turn now to the ticket condition, as it has been referred to, which is directed to Clause 31, and which raises a question over which the courts have enjoyed 90 years of litigation since The Majestic.

Under the cases, the touchstone is whether the ticket reasonably communicates the importance of its contract provision.

[4] In this case, that is a close question. It is one upon which reasonable jurists, lawyers, and laymen might differ.

On the one hand, arguing for giving effect to Clause 31, there are the facts that the reference on the cover is clear and noticeable, and preceded by the word in solid capital letters, "IMPORTANT."

The sheet containing what is stated to be the terms and conditions of contract of passage falls out of the ticket in a manner that attracts the passenger's attention to it, and, furthermore, as mentioned in at least one of the cases, there is the sensible understanding, that the passenger must be taken to understand, that these intricate provisions in Italian and English were not printed simply for the fun of it, but had legal meaning which affected the contract of passage.

On the other hand, the cover reference is unobtrusive rather than eye-catching. It merely draws attention to the ship owner's terms and conditions, and does not explicitly state that the ticket represents a contract affecting the passenger's substantial rights.

If its tiny type is read, Clause 31 carries an importance beyond the importance of clauses dealing with short statutes of limitation.

While a statute of limitations clause can be [5] examined after the accident when the importance of the contract as a whole is apparent to all, the effect of Clause 31 is immediately and irrevocably to divest the passenger's right to sue anywhere except before the judicial authority in Naples.

Yet, the contract is at least indirectly ambiguous on that point. For unlike the time limitation Clause 27, Clause 31 is not included in the list of clauses of which the passenger "specifically approves."

Finally, there is a place for the passenger's signature at the bottom of the contract, a provision which as far as appears has been entirely disregarded by both parties to the contract.

On the question, then, as a whole, I find that the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States.

That brings me to the final ground for the motion, the *forum non conveniens* argument, which is raised in a case in which there are in this forum Chandris, Inc., every plaintiff, of whom all are United States citizens, and Crown Travel, and all the initial parties to the suit. The contract was made here and delivered here.

As against that arguing for transfer there are [6] three serious considerations offered. The first is the location of Lauro's crew witnesses. These matters always involve balancing. On balancing their travel here it would not appear to me to impose such a burden as to upset the plaintiff's choice of forum.

The other body of witnesses located in Italy, who have been referred to as the terrorists, do not appear to me to be so important to the issues in this case as to justify its transfer to Naples.

Finally, there is the question of the application of Italian law, and as to the ultimate application of Italian law in this action, I make no ruling at this time.

What issues Italian law might govern is a point as yet somewhat unclear, nor does there appear at this point any particular difficulty in ascertaining or applying Italian law to the extent it may properly be required, and, therefore, I do not find that that factor either separately or in concert with the others justifies transfer under *forum non conveniens*.

Accordingly, the motion is denied, and will be so endorsed for the reasons stated. Thank you very much.

(2)

No. 88-23

IN THE

Supreme Court of the United States

October Term, 1988

LAURO LINES s.r.l.,

Petitioner,

v.

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and /or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS BRIEF IN OPPOSITION

FISCHER, & KAGAN,
Wall Street Plaza
88 Pine Street
25th Floor
New York, New York 10005
Counsel for Respondents
Ilsa Klinghoffer
Lisa Klinghoffer

On the Brief
Jay D. Fischer
Jeffrey D. Marks

QUESTION PRESENTED FOR REVIEW

Is an order of a United States District Court denying enforcement of a foreign forum selection clause appealable as a collateral final order?

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS BRIEF IN OPPOSITION

Respondents Ilsa Klinghoffer and Lisa Klinghoffer respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Appeals for the Second Circuit in this case. That opinion is reported at 844 F.2d 50.

OPINIONS BELOW

The opinion of the United States Court Appeals for the Second Circuit officially reported at 844 F.2d 50 (2d Cir. 1988) is printed in the Appendix at 1a-12a. the decision of the United States District Court for the Southern District of New York dictated in open Court on October 21, 1987, not officially reported, is printed in the Appendix at 13a-17a.

STATEMENT OF THE CASE

Petitioner Lauro Lines s.r.l. ("Lauro Lines") is the successor by merger to Achille Lauro de Altri-Gestione m/n "Achille Lauro" s.n.c. ("ALA") and Societa de Fatto Achille Lauro ed Altri-Gestione Armatoriali Nava Noleggiate ("FAL"), partnerships whose offices were located at Via C. Columbo 45, Naples, Italy. ALA owned the Italian-flag ACHILLE LAURO. Since February, 1982 both partnerships were in Italian reorganization proceedings. On July 28, 1986 all members of the Lauro group, including these partnerships, were merged into one company, *i.e.*, Lauro Lines s.r.l. The merger was deemed retroactive to February, 1982.

On Septmber 14, 1984 ALA time chartered the ACHILLE LAURO to a joint venture composed of FAL and Chandris S.A. (Piraeus). The Joint Venture operated the Vessel as a cruise ship. Tickets were sold to passengers worldwide. Chandris S.A. (Piraeus) was reponsible for the United States market. It retained Chandris, Inc. in New York to promote bookings and distribute tickets to interested travel agents, and others.

In October, 1985 the ACHILLE LAURO was hijacked by terrorists while on a cruise in the Mediterranean. The cruise commenced at Genoa, Italy, and it was scheduled to terminate at that port. The ticket held by each passenger contained 32 provisions. Among them was the following:

> Art. 31—VENUE OF JUDICIAL PROCEEDINGS—All controversies that may arise directly or indirectly in connection with or in relation to this passage contract, must be instituted before the judicial authority in Naples, the jurisdiction of any other authority being expressly renounced and waived . . .

Beginning in November, 1985 certain American passengers (and the representative of a deceased passenger) brought a series of suits in the United States District Court for the Southern District of New York against Lauro Lines, Chandris, and Crown Travel Service, Inc. ("Crown"). Jurisdiction was based upon diversity of citizenship, 28 U.S.C.A.§ 1332, and, the actions are also within the District Court's admiralty jurisdiction. 28 U.S.C.A. § 1333.*

On November 17, 1986 Lauro Lines filed a motion for an order dismissing all actions against it on the grounds of lack of New York *in personam* jurisdiction, the ticket forum selection clause, and *forum non conveniens*. Defendants Chandris and Crown joined the motion to dismiss on the basis of the forum clause. Plaintiffs in all actions opposed the motion.

On October 21, 1987 following oral argument, the District Court denied Lauro Line's motion. With respect to the forum selection clause, the District Court stated, in part:

> I find that the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States.

App. 16a.

* The Chasser action (85 Civ. 9708) (diversity of citizenship); the Klinghoffer action (85 Civ. 9303) (diversity of citizenship and the Death on the High Seas Act, 28 U.S.C. 761 *et* seq.); the Saire action (86 Civ. 6332) diversity of citizenship); the Meskin action (86 Civ. 4657) (no jurisdiction allegation in the Complaint).

On October 23, 1987 the Order denying enforcement of the forum clause was entered by the District Court.

On November 20, 1987 Lauro Lines filed its Notice of Appeal from that portion of the Order denying enforcement of the foreign forum selection clause. Appellate jurisdiction was invoked under the collateral final order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) *cert. granted*, 336 U.S. 917 (1949). Chandris and Crown filed similar Notices of Appeal. All cases were consolidated for purposes of the appeal.

On January 29, 1988 plaintiffs filed a motion to dismiss the appeal for want of appellate jurisdiction.

On April 7, 1988 the United States Court of Appeals for the Second Circuit granted the motion for an order dismissing the appeal for lack of appellate jurisdiction. The Second Circuit concluded that:

> The order at issue here is not appealable under the collateral order doctrine, *Chasser v. Achille Lauro Lines*, 844 F.2d 50, 56 (2d Cir. 1988).

REASONS WHY THE WRIT SHOULD BE DENIED

THE INSTANT CASE IS NOT THE PROPER CASE TO DECIDE THE QUESTION PRESENTED

Petitioner relies on Rule 17:1(a) of the Supreme Court Rules stating that one of the character reasons considered by the Court in determining whether to exercise it discretion to review by writ of certiorari is:

> When a Federal Court of Appeals has rendered a decision in conflict with the decision of another federal court of appeal on the same matter . . . .

The key words are 'same matter'. In the instant case, the contract is one of adhesion, not normally reviewable by the consumer. This matter does in fact differ from the decisions

in the other Circuits and as such is not in conflict. The Courts recognize that the various sophistication levels of the contracting parties and the likelihood to review a forum selection clause present 'different matters' for judicial decision.

Four Courts of Appeals, exclusive of the Court below, have considered the question whether an order denying enforcement of a forum selection clause is appealable as a collaterally final order. A common thread running through the facts of each case has been that the contract examined was of a type which is ordinarily subject to extensive review.[1]

The current facts indicate that the plaintiffs were not adequately directed to the terms inside the ticket by defendant. Whether a notice on the face of a ticket is sufficient to "draw the passengers attention to the conditions" within, and thereby incorporate those conditions into the ticket/contract, depends upon the particular circumstance of each case and the ticket involved. It is not uncommon for a Court in the process of scrutinizing a ticket (in order to determine a defendant carrier's motion to dismiss) to engage in consideration of such minutia as the shape of the ticket, how it is bound, the number of pages, the placement of each phrase, the size of the type utilized, the number of columns of print, the languages used and the color of paper and ink employed. *McQuillan v. Italia Societa Per Azione Di Navigazione*, 386 F. Supp. 462 (S.D. N.Y. 1974), *aff'd*, 516 F.2d 896 (2d Cir. 1975).

[1] *Coastal Steel Corp. v. Tilghman.*, 709 F.2d 190 (3rd Cir. 1983), *cert. denied*, 464 U.S. 938 (1983) involving a commercial building contract; *Farmland Industries v. Frazier-Parrot Commodities*, 806 F.2d 848 (8th Cir. 1986) involving a commercial commodities contract; *Louisiana Ice Cream Distributors v. Carvel Corp.*, 821 F.2d 1031 (5th Cir. 1987) involving sales, distribution, retail and license agreements; *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860 (7th Cir. 1984), *cert. denied*, 469 U.S. 890 (1984) involving an employment contract.

The Achille ticket has but one reference on the outside of the ticket directing passengers to read the terms, including Art. 31, within. It is far from certain that the Achille Lauro ticket "reasonably communicates the importance"[2] of a term in conditions of passage, a term which would require a passenger to return to Europe to have their day in Court.

Public policy argues against contracts of adhesion which lay venue outside the United States. In *Bremen v. Zapata Off-Shore Company* 407 U.S. 1 (1972)[3] the Court stated that forum selection clauses are "*prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Id.* at 10.

The *Zapata* holding that forum selection clauses are *prima facie* valid can be distingushed on the facts in the same manner the four decisions of the other Courts of Appeals can be distinguished from that of the Court below. Critical to the Court's holding in *Zapata* is that:

> The choice of (the London) forum was made in an arms-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *Id.* at 12.

Under the facts of *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 344 (3d Cir. 1966) cited by the *Zapata* Court to define reasonableness, "mere inconvenience

[2] *McQuillan*, at 466.

[3] *Zapata* involved a contract between an ocean-towing tug service based in Europe and an American offshore drilling concern. The Bremen was to tow a large, barge mounted, drilling rig from the Gulf of Mexico to the North Sea. In route the rig was damaged and the Bremen put into port at Florida. The contracts to tow placed venue for any litigation in London. Zapata attempted to litigate in the U.S. Evertually the Supreme Court gave the forum selection clause effect.

or additional expenses" were found insufficient to constitute a test of unreasonableness in a forum selection clause. This is logical in the context of a commercial contract "since it may be assumed that the plaintiff *(i.e.*, the party resisting the forum provision) received under the contract, consideration" for any such expense or inconvenience. *Id.* at 344-45. There is room to argue that an unsophisticated tourist should not be held to the same standard of reasonableness. *Cf. L.F.C. Lessors Inc. v. Pearson*, 585 F. Supp. 1362 1364 (D.Mass. 1984).[4]

The Achille plaintiffs were not dealing with the defendants at arms length and surely, if confronted directly with the forum selection clause at Art. 31, would have hesitated to accept the contract.

The court in *Davenport v. Adolph*, 314 N.W. 2d 432, (Iowa 1982), 31 A.L.R. 4th 395, 403, surveyed the attitude of different jurisdiction's choice-of-forum provisions and reported that such provisions "are less likely to be sustained if they appear in adhesion contracts prepared in advance by one of the parties and will generally be disregarded if genuine inconvenience or inadequacy of remedy would ensue from them.[5]

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[4] In *L.F.C.* the defendant opposed a forum selection provision. The court upheld the provision after finding that the defendant was not an "unsophisticated consumer" but a businessmen.

[5] Cruise tickets are without question adhesion contracts. "The ticket is what has been called a contract of 'adhesion' or a 'take or leave it' contract. In such a standardized or mass production agreement with one sided control of its terms, when the one party has no real bargaining power, the usual contract rule, based on the idea of 'freedom of contract' cannot be applied rationally. For such a contract is 'sold not bought'. The one party dictates its provisions, the other has no more choice in fixing those terms than he has about the weather . . . . "*Seigelman v. Cunard White Star*, 221 F.2d 189, 204 (2d Cir. 1955).

In contrast is New York Southern District's clear position that "Courts in this District have consistently found that it is not unreasonable to enforce a choice of forum provision embodied within a standard printed form." *Dukane Fabrics International, Inc.v. M.V. Hreljin*, 600 F. Supp. 202, 203 (S.D.N.Y. 1985). The District Court cites two cases in support of this proposition.[6] All three cases are commercial in nature-contracts, which involve sophisticated parties and which would ordinarily be subject to extensive review. None involve passenger contracts for a cruise ship.

The question posed by Petitioner is very broad. Whether a given forum selection clause is appealable must rest on the facts and circumstances of each case. Should this Court feel that the Circuits which have decided the issue, none of which have addressed adhesion contracts and unsophisticated parties thereto, are in conflict, then a case similar to those decided by the conflicting Circuits should be used to finally decide the issue. This case is not suitable for the question.

THE APPELLATE PROCESS IS PROCEDURAL IN NATURE THUS ENABLING EACH CIRCUIT TO ESTABLISH ITS PROCEDURAL PRACTICE.

An appeal from the judgment of a Federal District Court is a matter of right.[7] However, the Court of Appeals must grant

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[6] *Galaxy Export Cor. v. M/V "Hektor"*, 1983 A.M.C 2637 (S.D.N.Y 1983); *Patterson, Zochonis (U.K.) Ltd. v. Compania United Arrows S.A.*, 493 F. Supp. 626 (S.D.N.Y. 1980).

[7] *Bray v. U.S.*, 370 F.2d 44, 46 (5th Cir. 1966). See, also, *Brewen v. U.S.*, 375 F.2d 285, 286 (5th Cir. 1967); *Fennell v. U.S.*, 339 F.2d 920, 922 (10th Cir. 1965), *cert. denied* 86 S. Ct. 100, 382 U.S. 852, 15 L.Ed.2d 90.

permission for a litigant to appeal to that Court. The granting of permission may at times occur in an informal fashion[8] but ordinarily is accomplished by explicit order. If no application is made to it within the time specified by statute, no appeal can be taken.[9] The statutory criteria of 28 U.S.C. § 1292 'Interlocutory Decisions' do not literally apply to the Court of Appeals, which is simply authorized to permit appeals in its discretion.[10] Permission to appeal is granted sparingly not automatically. *Alabama Labor Council v. State of Alabama;* 453 F.2d 922, 924 (5th Cir. 1972). The Senate report[11] compared this to that of the Supreme Court in controlling its certiorari jurisdiction and noted that jurisdiction might be denied without specifying reasons[12] and for such reasons as the number of cases on the docket deserving priority. The statu tory criteria, however, are useful guides to the Courts of

[8] *In Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 929 note 2, (5th Cir. 1976) the plaintiffs sought relief from the judgment under Civil Rule 60(b) while an appeal was pending. After denial of relief, the plaintiffs requested leave for an interlocutory appeal, apparently relying on §1292(b). "This court carried with the merits appeal the motion for leave to appeal from the Rule 60 denial."

[9] Failure to file an application with the Court of Appeals within the ten day time limit provided by §1292(b) "is jurisdictional defect."

[10] "Permission to allow interlocutory appeals should . . . . be granted sparingly and with discrimination." *Control Data Corp. v. International Business Mach. Corp.*, 421 F.2d 323, 325 (8th Cir. 1970). "We agree with those courts that have held that the procedure authorized in subsection (b) should be used sparingly and with discrimination." *Lear Siegler, Inc. v. Adkins*, 330 F.2d 595, 598 (9th Cir. 1964).

[11] S.Rep. 2434, 85th Cong., 2d Sess., 1958, in 1958 U.S. Code Cong. & Admin. News 5255, 5257.

[12] "Although it is not incumbent upon this court to express our reasons for granting or denying an application for permission to take an interlocutory appeal, we do so in the present case." *Kraus v. Board of County Road Comm'rs*, 364 F.2d 919, 922 (6th Cir. 1966).

Appeals.[13] The implication of the appellate process is certainly that it is one of procedure.

Although Petitioner bases his appeal on the collateral final order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) rather than on the strict interpretation of 28 U.S.C. § 1292, the appellate process as explained remains the same.

The Court of Appeals for each Circuit may establish its own appellate procedure. The United States Code provides in part that:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with the Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. 28 U.S. C.A. §2071.

A court may promulgate rules and interpret them as adjuncts to dispensation of justice and orderly and expedient administration of its functions, with the limitation that substantial rights of litigants be not unduly circumscribed. *S. Stern & Co. v. U.S.*, 331 F. 2d 310, (C.C.P.A. 1963), *cert. denied*, 84 S. Ct. 1169.

The question becomes whether the substantial rights of litigants in the instant case have been unduly circumscribed. The order below points to t ere being no reason why denial of a motion to dismiss on the basis of a contractual forum

[13] "Although the statute does not expressly lay down standards to guide the Court of Appeals in its exercise of judicial 'discretion', it would seem that the appellate court should at least concur with the district court in the opinion that the proposed appeal presents a difficult central question of law which is not settled by controlling authority, and that a prompt decision by the appellate court at this advanced stage would serve the cause of justice by accelerating 'the ultimate termination of the litigation.' "*In Re Heddendorf*, 263 F.2d 887, 889 (1st Cir. 1959).

selection clause should be any less subject to correction upon appeal from a final judgment then are denials of motions for dismissal on grounds of improper venue or of forum-non-conveniens. *Chasser*, 844 F.2d at 54. The Supreme Court has made it clear that the mere fact that ultimately it might appear that an interim reversal would have been more efficient, or that the party against whom the order is entered may have difficulty in persuading the Appellate Court to reverse after a final judgment, is not reason to grant immediate review. *Stringfellow v. Concerned Neighbors In Action*, 107 S. Ct. 1177 (1987). The Court succinctly stated in *Richardson—Merrell Inc. v. Koller*, 472 U.S. 424, 436 (1985):

> "The possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress."

As is evident from these decisions, the consequences which would accompany the denial of enforcement of a forum selection clause are not considered as unduly circumscribing the rights of litigants thereby prohibiting the courts from prescribing their individual appellate rules on the matter.

Without restating the cases on which Petitioner relies to indicate conflict between the Circuits, should this Court in fact determine that there is such a conflict, this conflict is permissible pursuant to the rule making power afforded the various Federal Courts under 28 U.S.C.A. §2071.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted
Jay D. Fischer
Fischer & Kagan
Wall Street Plaza
88 Pine Street
25th Floor
New York, New York 10005
Counsel for Respondents

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1987

(Argued: February 16, 1988 Decided: April 7, 1988)
Docket Nos. 87-9081, -9083, -9085, -9087, -9089, -9091

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE,

Plaintiffs-Appellees,

— v. —

ACHILLE LAURO LINES, THE LAURO LINES s.r.l., FLOTTO ACHILLE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, S.N.C. ACHILLE LAURO ED ALTRI-GESTIONE MOTONAVE ACHILLE LAURO IN AMMINISTRAZIONE STRAORDINARIA, COMMISSARIO OF THE FLOTA ACHILLE LAURO IN AMMINISTRAZIONE STRAORDINARIA, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and /or CLUB ABC TOURS,

Defendants,

LAURO LINES s.r.l., CHANDRIS CRUISE LINES, CLUB ABC TOURS, INC., CROWN TRAVEL SERVICE, INC., d/b/a/ RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Defendants-Appellants.

Before:

KEARSE and MAHONEY, *Circuit Judges,*
and GLASSER, *District Judge**

Motion to dismiss appeals from an interlocutory order of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, denying motion of defendant Lauro Lines s.r.l. to dismiss actions on ground that contract provision required suit to be brought in Italy.

Motion granted.

MORRIS J. EISEN, P.C., New York, New York (Arthur M. Luxemberg, New York, New York), *for Plaintiffs-Appellees Sophie Chasser, Anna Schneider, Viola Meskin, Seymour Meskin, Sylvia Sherman, Paul Weltman, and Evelyn Weltman.*

WOLF, BLOCK, SCHORR & SOLIS-COHEN, Philadelphia, Pennsylvania, (Fischer, Kagan, Ascione & Zaretsky, New York, New York), *for the Klinghoffer Plaintiffs-Appellees.*

WILLIAM P. LARSEN, JR., New York, New York, (Newman, Schlau, Fitch & Burns, P.C., New York, New York), *for the*

* Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Saire Plaintiffs-Appellees.

RAYMOND A. CONNELL, New York, New York, (Healy & Baillie, New York, New York), *for Defendant-Appellant Lauro Lines s.r.l.*

KIRLIN, CAMPBELL & KEATING, New York, New York (Daniel J. Dougherty, New York, New York), *for Defendant-Appellant Chandris Cruise Lines.*

RUBIN, HAY & GOULD, P.C., Framingham, Massachusetts (Rodney E. Gould, Framingham, Massachusetts, A. George Koevary, Parker & Duryee, New York, New York), *for Defendant-Appellant Crown Travel Service, Inc., d/b/a Rona Travel and/or Club ABC Tours.*

KEARSE, *Circuit Judge:*

Defendants Lauro Lines s.r.l. ("Lauro"), *et al.*, appeal from an interlocutory order of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, denying Lauro's motion to dismiss the present actions on the basis of forum-selection clauses in the ticket agreements between Lauro, owner of the cruise ship ACHILLE LAURO, and plaintiffs, who were or represent passengers on the ACHILLE LAURO. The clauses provided that any suit by passengers against Lauro was to be brought in Naples, Italy. Plaintiffs have moved to dismiss the appeals for lack of appellate jurisdiction. For the reasons below, we grant the motion.

BACKGROUND

Plaintiffs, citizens and residents of the United States, were passengers, or are the executrixes of the estates of persons who were passengers, aboard the ACHILLE LAURO on a

Mediterranean cruise in October 1985 when it was hijacked by terrorists of the Palestine Liberation Organization ("PLO"). The passengers were held captive and terrorized by the PLO, and they have brought the present actions, informally consolidated below, to recover damages for physical and psychological injuries and for the wrongful death of Leon Klinghoffer.

Lauro moved to dismiss the actions on several grounds, including the ground that a forum-selection clause in each passenger ticket required plaintiffs to bring these suits in Naples. The district court denied the motion to dismiss. With respect to the forum-selection clause, the court stated that the touchstone for enforceability was "whether the ticket reasonably communicates the importance of its contract provision." Transcript dated October 21, 1987 ("Tr."), at 3. The court described the "cover reference" to the forum clause as "unobtrusive" and noted that the clause itself appeared in "tiny type." *Id.* at 4. Further, the court noted that though the ticket provided that the passenger " 'specifically approves' " certain clauses, the forum-selection clause was not among them. *Id.* at 5. In addition, though there was a place for the passenger's signature at the bottom of the contract, apparently none of the tickets was signed. In sum, while the district court termed the question of adequacy of notice a close one as to which reasonable persons might differ, *id.* at 4, it concluded that "as a whole . . . the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States," *id.* at 5. Accordingly, the court denied the motion to dismiss.

Lauro and two other defendants have appealed the court's refusal to dismiss on the basis of the forum-selection clause. Plaintiffs have moved to dismiss the appeals on the ground that the denial of the motion for dismissal is an interlocutory order that is not appealable under 28 U.S.C.§ 1291 (1982). Lauro, which made no effort to have the court's denial on

forum-selection grounds certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) (1982), argues that that denial is a final order insofar as it determines where the litigation will be conducted and that it is immediately appealable under § 1291 pursuant to the *Cohen* doctrine, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). We conclude that the order is not appealable and we therefore dismiss the appeals.

DISCUSSION

Section 1291 gives the courts of appeals jurisdiction to review "final decisions" of the district courts. 28 U.S.C. § 1291. The district court's denial of a motion to dismiss, which leaves the controversy pending, is not, technically, a final decision within the meaning of this section. *See, e.g. Catlin v. United States*, 324 U.S. 229, 236 (1945). The *Cohen* doctrine, on which Lauro here relies, is a judicially created exception that allows an immediate appeal from certain orders that are collateral to the merits of the litigation and that cannot be reviewed adequately after final judgment. As the Supreme Court has described it,

> [t]he collateral order doctrine is a "narrow exception," . . . whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. *See Helstoski v. Meanor*, 442 U.S. 500, 506–508 (1979); *Abney v. United States*, 431 U.S. 651, 660–662 (1977). To fall within the exception, an order must at a minimum satisfy three conditions: It must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment."

Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430–31 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

The narrowness of the collateral order doctrine reflects judicial deference to Congress's preference against piecemeal appeals, as well as the recognition that judicial efficiency may

be promoted by the denial of interim review because some interlocutory orders will have become moot by the time a final judgment is entered, either because the order is modified prior to final judgment, or because the party disadvantaged by the interlocutory order prevails in the action, or for some other reason. *See, e.g., Stringfellow v. Concerned Neighbors In Action, 107 S. Ct. 1177, 1184 (1987) ("Stringfellow"); Mitchell v. Forsyth,* 472 U.S. 511, 544 (1985) (Brennan, *J.*, concurring in part and dissenting in part). The Court has made it clear that when an interlocutory order will be reviewable on appeal from a final judgment, the mere fact that ultimately it might appear that an interim reversal would have been more efficient, or that the party against whom the order is entered may have difficulty in persuading the appellate court to reverse after a final judgment, is not a reason to grant immediate review. In *Stringfellow,* for example, a party that had been allowed to intervene in an action on condition, *inter alia,* that it not assert new claims sought to appeal immediately from the imposition of conditions on its intervention. Though it conceded that it would have the right to a review of the conditions upon appeal from the final judgment, it argued that the practicalities of complex and protracted litigation would make an appellate court reluctant to vacate the judgment on the basis of an erroneous intervention order. The Court was unpersuaded that this consideration should lead to disregard of the *Cohen* requirement of effective unreviewability on appeal from final judgment. As the Court succinctly stated in *Richardson-Merrell Inc. v. Koller,* "the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress." 472 U.S. at 436.

This Court too has generally been reluctant to apply the *Cohen* doctrine in an expansive fashion, "lest this exception swallow the salutory 'final judgment' rule." *Weight Watchers v. Weight Watchers Int'l, Inc.,* 455 F.2d 770, 773 (2d Cir. 1972); *see, e.g. Richardson Greenshields Securities, Inc. v. Lau,* 825 F. 2d 647, 651 (2d Cir. 1987); *Carlenstolpe v. Merck & Co.,* 819 F 2d 33, 35–36 (2d Cir. 1987); *United States Tour*

Operators Ass'n v. Trans World Airlines, 556 F. 2d 126, 128 (2d Cir. 1977). For example, our decisions indicate that this doctrine does not permit immediate appeals pursuant to § 1291 from orders denying motions to dismiss on grounds of improper venue, *see A. Olinick & Sons v. Dempster Bros., Inc., 365 F.2d 439, 442-44 (2d Cir. 1966), or forum non conveniens, see Carlenstolpe v. Merck & Co., 819 F.2d at 35-36.*

We have not previously considered the applicability of the *Cohen* doctrine to the denial of a motion to dismiss on the basis of a contractual forum-selection clause. Some of our sister circuits have concluded that such a denial is immediately appealable, *see Farmland Industries v. Frazier-Parrott Commodities,* 806 F.2d 848, 850-51 (8th Cir. 1986); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.,* 709 F.2d 190, 193-97 (3d. Cir.) (*"Coastal Steel"*), *cert. denied,* 464 U.S. 938 (1983), while others have concluded that is not, *see Louisiana Ice Cream Distributors v. Carvel Corp.,* 821 F.2d 1031, 1032-34 (5th Cir. 1987); *Rohrer, Hibler & Replogle, Inc. v. Perkins,* 728 F.2d 860, 862 (7th Cir.), *cert. denied,* 469 U.S. 890 (1984). We are persuaded that the latter view is correct because we believe the refusal to dismiss on forum-selection grounds is not "effectively unreviewable on appeal from a final judgment."

The Third Circuit in *Coastal Steel* came to the conclusion that the district court's refusal to enforce a contractual forum-selection clause was unreviewable on appeal from a final judgment because 28 U.S.C. § 2105 (1982) provides that "[t]here shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." We do not agree that § 2105 makes a refusal to enforce a forum-selection clause unreviewable after final judgment or, if it did have that effect, that it would allow such a refusal to be reviewed at an earlier state.

If § 2105 were to be taken literally and did preclude review of such denials after final judgment, we would be at a loss to understand how there could properly be interim review any

more than review after final judgment, for "no reversal" has a rather categorical flavor. *Coastal Steel's* rationale was that § 2105 could not have been intended to preclude interim review pursuant to the collateral order doctrine because that doctrine had not been devised in 1789 when the first progenitor of § 2105 was adopted. *See* 709 F.2d at 196. We find this rationale unpersuasive for two reasons. First, if Congress has indeed made a certain type of order immune from review, the courts simply are not free to ignore the congressional limitation. *See, e.g., Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976) (order remanding removed action to state court on grounds provided in 28 U.S.C. § 1447(c)(1982) is made unreviewable by *id.* § 1447(d), and thus may not be reviewed). Second, the *Cohen* doctrine, which interprets finality within the meaning of § 1291, is concerned with the timing of review; it assumes reviewability in principle and focuses on the practical difficulties entailed by postponement of review. The doctrine has not, to our knowledge, been used to review at any time an order of a type that Congress has made unreviewable in principle.

Further, assuming that § 2105 applies to forum-selection motions, if the section were taken literally, it would forbid review of even the granting of a motion to dismiss on forum-selection-clause grounds, for that section does not forbid reversals just of *denials* of motions in abatement; it forbids reversals of any nonjurisdictional "ruling" upon a matter in abatement. We have seen no authority supporting the proposition that such a dismissal, which would, of course, be a final decision in the litigation, is unreviewable.

It appears to us, however, that § 2105 is not to be taken literally. Commentators have called it "one of the most commonly ignored provisions of the Judicial Code," noting that its "most important feature . . . is certainly its disuse." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3903, at 412, 413 (1976). This seems an accurate observation, for assuming, as did *Coastal Steel*, 709 F.2d at 196, that "matters in abatement" means any (nonjurisdictional) ground for dismissal that would leave the parties free to pursue the suit in another forum, that category would appear to encompass matters such as motions to dismiss on grounds of improper venue or forum non conveniens; yet both grants and denials of those motions are commonly thought to be reviewable on appeal from final judgment. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (review of grant of forum non conveniens motion); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (same); *In re Air Crash Disaster*, 821 F.2d 1147, 1166-68 (5th Cir. 1987) (en banc) (reviewing denial of motion to dismiss for forum non conveniens), *petition for cert. filed* (U.S. Nov. 6, 1987) (No. 87-750); *Carlenstolpe v. Merck & Co.*, 819 F.2d at 35-36; *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967) (review of denial of motion to dismiss for improper venue); *Gill v. United States*, 184 F.2d 49, 50-51 (2d Cir. 1950) (same); *Corke v. Sameiet M.S. Song of Norway*, 572 F.2d 77 (2d Cir. 1978) (reviewing denial of motion to transfer venue); *Central Valley Typographical Union, No. 46 v. McClatchy Newspapers*, 762 F.2d 741, 744-46 (9th Cir. 1985) (reviewing both grant by first district court of a motion to transfer venue and denial by transferee district court of a motion to transfer to a third district).

We see no reason why denial of a motion to dismiss on the basis of a contractual forum-selection clause should be any less subject to correction upon appeal from a final judgment than are denials of motions for dismissal on grounds of improper venue or of forum non conveniens. The Supreme Court has held that a forum-selection clause in a commercial agreement "should control absent a strong showing that it should be set aside." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *see Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Such a clause thus grants an important right that should be recognized unless the party resisting enforcement shows the clause to be unreasonable. We would think, therefore, that if the district court has erroneously

failed to enforce such a clause, its order may be reversed when the judgment is finally appealed.

Perhaps the most pertinent case decided by our Court is *Avis Rent A Car System, Inc. v. Garage Employees Union, Local 272*, 791 F.2d 22 (2d Cir. 1986), an appeal from a final judgment enforcing an arbitration award. The ground of the appeal was that the district court had refused to enforce a contract provision that required arbitrators to be selected in a certain way from among a certain group. Noting that "analogous contractual forum section clauses are ordinarily binding and enforceable unless the party resisting them . . . shows them to be unreasonable," *id.* at 26, and ruling that no showing of prejudice was required by the party seeking enforcement of the clause, we reversed the judgment enforcing the award entered by the "wrong" arbitrator, and we remanded for entry of an order directing the parties to place their dispute before an arbitrator called for by the contract. Plainly, therefore, in the context of arbitration clauses, which are a type of forum-selection clause, this Court has viewed the refusal to enforce as a matter that is fully reviewable on appeal from the final judgment.

We reject Lauro's suggestion that the right granted in a forum-selection clause, if enforceable, must be vindicated immediately or it is lost. It is a right to have the binding adjudication of claims occur in a certain forum; it is not a right of the same magnitude as a constitutional right to be free from double jeopardy, *see Abney v. United States*, 431 U.S. at 660-62, or the right to be free of any trial whatever, *see Mitchell v. Forsyth*, 472 U.S. at 530 (qualified governmental immunity); *Helstoski v. Meanor*, 442 U.S. at 506-08 (Speech and Debate immunity). The rights to escape any trial or any further trial are rights that would be lost unless vindicated at a pretrial state. In contrast, the right to secure adjudication in a particular forum is not lost simply becuse enforcement is postponed. And, as noted above, the fact that postponing review may entail additional litigation expense has

been explicitly rejected by the Supreme Court as a basis for immediate appeal.

Since we conclude that the district court's denial of Lauro's motion to dismiss on the basis of the forum-selection clause in the passenger tickets will be effectively reviewable on appeal from final judgment, we need not decide whether the first two *Cohen* requirements are met. We conclude that the order at issue here is not appealable under the collateral order doctrine.

Our recent decision in *Karl Koch Erecting Co. v. New York Convention Center Development Corp.*, Nos. 87-7306, *et al.*, slip op. 1431, 1434-36 (2d Cir. Feb. 3, 1988), does not suggest a contrary result. In *Karl Koch*, we held, relying on *Pelleport Industries v. Budco Quality Theatres*, 741 F.2d 273, 278 (9th Cir. 1984), that a district court's enforcement of a contractual forum-selection clause, by remanding a removed action to state court, was appealable under the *Cohen* doctrine. Unlike a refusal to enforce, with which we are presented here, the *Karl Koch* enforcement finally decided the forum-selection issue in a way that made the decision unreviewable on appeal from the final judgment simply because the litigation was no longer proceeding in federal court.

Finally, we reject Lauro's fall-back suggestion that we have jurisdiction of these appeals under 28 U.S.C. § 1292(a)(1) (1982). That section allows appeals of interlocutory orders that grant or deny (or otherwise deal with) injunctions. We do not regard the denial of a motion to dismiss on forum-selection grounds as the equivalent of the denial of a motion for an injunction within the meaning of § 1292(a)(1). Further, even if such a denial were tantamount to the denial of injunctive relief, we would grant the present motion to dismiss, for the Supreme Court "has made it clear that not all denials of injunctive relief are immediately appealable; a partly seeking review also must show that the order will have a " 'serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" *only* by immediate appeal.' " *Stringfellow*, 107 S. Ct. at 1184 (quoting *Carson v. American*

Brands, Inc., 450 U.S. 79, 84 (1981) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955))) (emphasis ours). *See also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 56 U.S.L.W. 4243 (U.S. Mar. 22, 1988). Since, for the reasons discussed above, we have concluded that meaningful appellate review of the present order will be available after final judgment, assuming that judgment is adverse to Lauro, § 1292(a)(1) provides no basis for immediate appeal of the present order.

CONCLUSION

We have considered all of Lauro's arguments in support of immediate appealability and have found them to be without merit. The appeals are dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
85 Civ. 9303
October 21, 1987
12:55 p.m.

LEON KLINGHOFFER, ET AL.,

Plaintiffs,

v.

ACHILLE LAURO, ET AL.,

Defendants.

Before:

HON. LOUIS L. STANTON,

District Judge

DECISION

Appearances

JAY D. FISCHER,
MORRIS EISEN,

Attorneys for Plaintiffs

LAWRENCE W. SCHILLING,
RAYMOND A. CONNELL,
DANIEL J. DOUGHERTY,
RODNEY GOULD,

Attorneys for Defendants

[2] (In open court)

THE COURT: Thank you, gentlemen. And thank you all for excellent briefs on the points involved in this motion.

They have been expressed in writing and orally with clarity and vigor and style, and admirably cover the great variety of aspects involved.

In ruling on the motion in a somewhat laconic fashion, I do not wish to be taken as disregarding any of the areas presented in the papers or orally, but do so because I feel no jurisprudential purpose would be served by expanding my explanation beyond the points which I regard as decisive.

As to jurisdiction over Lauro, this question arises under New York's Long Arm Statute, which requires a showing of a continuous and systematic course of doing business here such as to warrant a finding of Defendant Lauro's presence in this jurisdiction.

Mere solicitation of business through an agent is not enough, although if solicitation is present, in any substantial degree, very little more is necessary to the conclusion that business is being done.

The argument presented on this motion, since it is common ground that solicitation of business was being done, lies in the fact that Lauro's agent for sales [3] and marketing here was Chandris, Inc., which had authority to confirm some cabins on the Achille Lauro, and which had been at least instrumental in part in obtaining for Crown Travel its authority to confirm other space.

In addition, Chandris, Inc., has been responsible for effecting changes in the Achille Lauro's itinerary, and in some degree to the accommodations of the vessel itself. Chandris, Inc., issued tickets for confirmed space, for money which was received and deposited in an account it maintained for Lauro's name, and Chandris, Inc., also handled at least on various occasions the adjustment of passenger complaints.

There are other activities alluded to, including the volume of passengers which was booked and the amount of money involved, but taken as a whole, those of Chandris, Inc.'s, activities are in themselves sufficient to bring Lauro within the jurisdiction of this court, and that ground of the motion is rejected.

I turn now to the ticket condition, as it has been referred to, which is directed to Clause 31, and which raises a question over which the courts have enjoyed 90 years of litigation since The Majestic.

Under the cases, the touchstone is whether the ticket reasonably communicates the importance of its contract provision.

[4] In this case, that is a close question. It is one upon which reasonable jurists, lawyers, and laymen might differ.

On the one hand, arguing for giving effect to Clause 31, there are the facts that the reference on the cover is clear and noticeable, and preceded by the word in solid capital letters, "IMPORTANT."

The sheet containing what is stated to be the terms and conditions of contract of passage falls out of the ticket in a manner that attracts the passenger's attention to it, and, furthermore, as mentioned in at least one of the cases, there is the sensible understanding, that the passenger must be taken to understand, that these intricate provisions in Italian and English were not printed simply for the fun of it, but had legal meaning which affected the contract of passage.

On the other hand, the cover reference is unobtrusive rather than eye-catching. It merely draws attention to the ship owner's terms and conditions, and does not explicitly state that the ticket represents a contract affecting the passenger's substantial rights.

If its tiny type is read, Clause 31 carries an importance beyond the importance of clauses dealing with short statutes of limitation.

While a statute of limitations clause can be [5] examined after the accident when the importance of the contract as a whole is apparent to all, the effect of Clause 31 is immediately and irrevocably to divest the passenger's right to sue anywhere except before the judicial authority in Naples.

Yet, the contract is at least indirectly ambiguous on that point. For unlike the time limitation Clause 27, Clause 31 is not included in the list of clauses of which the passenger "specifically approves."

Finally, there is a place for the passenger's signature at the bottom of the contract, a provision which as far as appears has been entirely disregarded by both parties to the contract.

On the question, then, as a whole, I find that the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States.

That brings me to the final ground for the motion, the *forum non conveniens* argument, which is raised in a case in which there are in this forum Chandris, Inc., every plaintiff, of whom all are United States citizens, and Crown Travel, and all the initial parties to the suit. The contract was made here and delivered here.

As against that arguing for transfer there are [6] three serious considerations offered. The first is the location of Lauro's crew witnesses. These matters always involve balancing. On balancing their travel here it would not appear to me to impose such a burden as to upset the plaintiff's choice of forum.

The other body of witnesses located in Italy, who have been referred to as the terrorists, do not appear to me to be so important to the issues in this case as to justify its transfer to Naples.

Finally, there is the question of the application of Italian law, and as to the ultimate application of Italian law in this action, I make no ruling at this time.

What issues Italian law might govern is a point as yet somewhat unclear, nor does there appear at this point any particular difficulty in ascertaining or applying Italian law to the extent it may properly be required, and, therefore, I do not find that that factor either separately or in concert with the others justifies transfer under *forum non conveniens*.

Accordingly, the motion is denied, and will be so endorsed for the reasons stated. Thank you very much.

(3) No. 88-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

v.

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MORRIS J. EISEN
233 Broadway
New York, New York 10279
(212) 341-8394
Counsel of Record

MORRIS J. EISEN
ARTHUR M. LUXENBERG
KENNETH A. SCHACHTER
MORRIS J. EISEN, P.C.
233 Broadway
New York, New York 10279
(212) 341-8394
Of Counsel

QUESTION PRESENTED FOR REVIEW

Is an order of a United States District Court denying enforcement of a foreign forum selection clause appealable as a collateral final order?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

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-against-

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents SOPHIE CHASSER, VIOLA and SEYMOUR MESKIN, PAUL and EVELYN WELTMAN, SYLVIA SHERMAN and ANNA SCHNEIDER respectfully request that this Court deny the

petition for writ of certiorari, seeking review of the opinion of the Court of Appeals for the Second Circuit in this case. That opinion is reported at 844 F.2d 50.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit, by Circuit Judge Kearse, decided on April 7, 1988 that the interlocutory order of the United States District Court for the Southern District of New York, Louis L. Stanton, Judge, denying defendant, ACHILLE LAURO's motion to dismiss the present actions on the basis of forum selection clauses contained in cruise ship tickets of passage was not appealable, and thus granted plaintiffs' motion to dismiss defendants appeals for lack of appellate

jurisdiction. (Appendix A, pp. 1a-14a)*.

The Hon. Louis L. Stanton, of the United States District Court for the Southern District of New York denied defendants' motion to dismiss on the grounds of a forum selection clause contained in the cruise ship ticket of passage, in an Order dated October 21, 1987, entered October 23, 1987 (Appendix B, pp. 15a-18a).

The District Court in finding that the ticket of passage did not reasonably communicate its terms and conditions to the passengers, noted:

> "(T)he cover reference is unobtrusive rather than eye catching. It merely draws attention to the shipowner's

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* Numbers in parentheses refer to pages in Petitioner, LAURO LINES' Petition for a Writ of Certiorari.

terms and conditions and does not explicitly state that the ticket represents a contract affecting the passengers substantial rights." (17a)

Judge Stanton discussing the significance of the forum selection clause stated:

"(T)he effect of Clause 31 (venue provision) is immediately and irrevocably to divest the passenger's right to sue anywhere except before the judicial authority in Naples.

Yet, the contract is at least indirectly ambiguous on that point." (17a) (emphasis added)

Furthermore, as observed by Judge Stanton:

"(A)s a whole, I find that the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States." (18a)

JURISDICTIONAL STATEMENT

The order of the Court of Appeals for the Second Circuit, dated and entered April 7, 1988, properly dismissed the appeal of petitioner, LAURO LINES, noting that the order of the District Court was neither a collateral order appealable as a "final decision" under Section 1291 of the Judicial Code, 28 U.S.C. Section 1291, nor an order 'refusing ... [an] injunction[ ]' under Section 1292(a)(1) of the Judicial Code, 28 U.S.C. Section 1292(a)(1). Thus, the Supreme Court of the United States should not exercise its discretion to review the order of the United States Court of Appeals.

STATEMENT OF THE CASE

In October of 1985, terrorists effortlessly gained admittance to the cruise ship, ACHILLE LAURO, in the midst of a cruise in the Mediterranean. The Palestinian Liberation Organization terrorists seized the ship holding hostage the passengers and crew members. Plaintiffs and other passengers were held captive under threat of having the ship blown up, and constantly under an unrelenting threat of death. As a result of the seizure and diversion of cruise ship, ACHILLE LAURO, plaintiffs were severely injured, threatened, denied adequate shelter, food and drink, proper sanitary facilities, medical attention and put in fear of their health and life. Plaintiff, LEON KLINGHOFFER was shot dead in cold blood and thrown overboard.

Defendants, in the United States District Court for the Southern District sought the enforcement of a forum selection clause, which was set forth in tiny type and buried deep within the confines of the ticket of passage for the ACHILLE LAURO, requiring that all disputes be litigated before the judicial authority in Naples. The ticket of passage contract did not reasonably communicate the importance of its terms and conditions to the passengers, as was noted by Judge Stanton in his decision for the District Court (Appendix B, pp. 15(a)-18(a)). The Achille ticket had but one reference on the outside of the ticket directing passengers to read the terms contained therein. The notice on the outside of the ticket directing passengers to the terms and conditions printed inside, specifically the venue provision at

Article 31, was insufficient to incorporate the term into the contract of passage. Moreover, Article 31 (venue provision) was excluded from the specifically approved articles listed in the concluding provision, in the last sentence of the terms of the passage ticket, thus leading a U.S. passenger to conclude that the right to venue in an action in a U.S. Court had not been waived. By equivocating on the applicability of the venue provision within the ticket of passage, the defendants cannot, as rightly decided by Judge Stanton, attempt to enforce such an adhesive, harsh provision, that was so ineffectually drawn. Furthermore, due to the fact that the plaintiffs received their passage tickets at the airport on the date of departure, notwithstanding the numerous requests made by plaintiffs to

obtain their tickets prior to that date, it was impossible to cancel or renegotiate alternative terms in the contract of passage, signed by neither party.

In The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972) in an opinion by Chief Justice Burger, the Supreme Court held that a forum selection clause should be specifically enforced unless it could be shown that enforcement would be unreasonable and unjust or that the clause was invalid for such reasons as fraud or overreaching (407 U.S. 1). Justice Burger, discussing England as the choice of forum in the Bremen contract stated:

> "The choice of that forum was made in an arm's length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." (407 U.S. at 12) (emphasis added)

It can hardly be maintained that The Bremen stood for enforcement of forum selection clauses in passenger tickets. Justice Burger, quoted Judge Wisdom from the Court of Appeals in The Bremen, reflecting the singular business nature of the contract at issue:

> "But this was not simply a form contract with boilerplate language that Zapata had no power to alter. The towing of an oil rig across the Atlantic was a new business. Zapata did make alterations to the contract submitted by Unterweser. The forum clause could hardly be ignored. It is the final sentence of the agreement, immediately preceding the date and the parties signatures ..." 428 F.2d 888, 907 (407 U.S. at 12, Note 14) (emphasis added)

The contracting parties in The Bremen were businessmen, experienced in the exigencies of international business, as manifested by their commercial agreement which reflected the legitimate expectations of the parties. In the

instant action, the effect of Judge Stanton's ruling was that the passengers of the Achille Lauro should not be held to the boilerplate language in the passage contract ticket, which they had no power to alter.

The Achille Lauro passage contract ticket was made and delivered in the U.S. The expectations of the passengers on the Achille Lauro were those of tourists on a cruise; not that they would be subjected to international terrorism and not that they would be forced into the courts of a foreign land to litigate a dispute arising therefrom.

In The Bremen, Justice Burger further stated:

> "There is strong evidence that the forum selection clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum

> clause figuring prominently in their calculations." (407 U.S. at 14) (emphasis added)

In the instant action, the only vital part of the agreement, aside from the fixed price passengers would pay, was that in return for such consideration the passengers would participate in a pleasure cruise in the Mediterranean on the Achille Lauro.

REASONS FOR DENYING THE WRIT

Pursuant to 28 U.S.C. Section 1291 the courts of appeals have jurisdiction to review "final decisions" of the district courts. A judicially created exception to the "final decision" rule codified in Section 1291, allowing immediate appeals for orders collateral to the merits of an action that cannot be reviewed after final judgment, was

established in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949):

> "This decision (District Court's denial of corporations motion to require plaintiff in stock-holder's derivative action to post security for reasonable expenses of defendant) appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

In the instant action, the Court of Appeals held that the District Court's denial of defendant, ACHILLE LAURO's motion to dismiss on the basis of the forum selection clause, which left the controversy pending, was not a final decision within the meaning of 28 U.S.C. Section 1291, and therefore dismissed the appeal (5a). Reflecting the fact that the District Court's determination will be

reviewable after a final disposition on the merits, the Court of Appeals, construing prior U.S. Supreme Court decisions, stated:

> "The Court has made it clear that when an interlocutory order will be reviewable on appeal from a final judgment, the mere fact that ultimately it might appear that an interim reversal would have been more efficient, or that the party against whom the order is entered may have difficulty in persuading the appellate court to reverse after a final judgment, is not a reason to grant immediate review." (7a) (emphasis added)

For an order to fall within the narrow exception to the final decision rule of 28 U.S.C. Section 1291 created by the decision in Cohen, it must satisfy a three prong test set forth by the Supreme Court in Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-469. 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978):

> "To come within the 'small class' of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. Abney v. United States, 431 U.S. 651, 658, 52 L. Ed. 2d 651, 97 S.Ct. 2034 (1977), United States v. MacDonald, 435 U.S. 850, 855, 56 L. Ed. 2d 18, 98 S.Ct. 1547."

Review of the District Court's order is available following a trial. The order is not separate from the merits of the cases themselves. Accordingly, the District Court's order is not appealable as a collateral order under Section 1291.

In the instant action, the Court of Appeals, in holding that the refusal to dismiss on forum selection grounds is not "effectively unreviewable on appeal from a final judgment", stated:

> "We see no reason why denial of a motion to dismiss on the basis of a contractual forum-selection clause should be any less subject to correction upon appeal from a final judgment

> than are denials of motions for dismissal on grounds of improper venue or of forum non conveniens." (8a, 11a)

The reasoning employed by the Court of Appeals for the proposition that the denial of the enforcement of a forum-selection clause is not a final decision unreviewable on appeal is that: "the right to secure adjudication in a particular forum is not lost simply because enforcement is postponed". (12a)

The Supreme Court has recently emphasized that the supposedly reduced chance of reversal from litigating a case to conclusion in order to appeal an adverse pre-trial ruling does not satisfy the requirement that a decision be effectively unreviewable on appeal from a final judgment. Stringfellow v. Concerned Neighbors in Action, 107 S.Ct. 1177, 1182-83 (1987).

The Supreme Court has stated the public policy furthered by precluding immediate review of every trial court ruling, which would impose, as would the granting of certiorari in the instant action, unreasonable disruption, delay and expense:

> "It would also undermine the ability of district judges to supervise litigation. In Section 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by 'piecemeal appellate review of trial court decisions which do not terminate the litigation'". United States v. Hollywood Motor Car Co., 458 U.S. 263, 265, 73 L. Ed. 2d 754, 102 S.Ct. 3081 (1982) [Merrell-Richardson, Inc. v. Koller, 472 U.S. 424, 430, 86 L. Ed. 2d 340, 105 S.Ct. 2757 (1985)] (emphasis added).

The Court in Merrell-Richardson delineated the reach of the exception to the final decision rule of Section 1291 propounded in the Cohen case:

> "The collateral order doctrine is a 'narrow exception' Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374, 66 L. Ed. 2d 571, 101 S.Ct. 669 (1981), whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal". See Helstoski v. Meanor, 442 U.S. 500, 506-508, 61 L. Ed. 2d 30, 99 S.Ct. 2445 (1979); Abney v. U.S., supra at 660-662. (Merrell-Richardson, supra, at 430-431) (emphasis added).

As noted above, in the instant action, the right to enforce a contractual forum selection clause is not lost simply because enforcement is postponed by the denial of a motion to dismiss on the basis of such a clause, which ruling is clearly subject to correction upon appeal from a final judgment. As a result, the denial of the enforcement of the forum selection clause was plainly not a right "irretrievably lost" by the absence of an immediate appeal.

The policy in support of the finality requirement imposed by Congress transcends the possibility that additional litigation expenses will be incurred by a party resulting from an erroneous ruling, as reflected by the Court in Merrell-Richardson [quoting Lusardi v. Xerox Corp., 747 F2d 174, 178 (CA3 1984)]:

> "If the expense of litigation were a sufficient reason for granting an exception to the final judgment rule, the exception might well swallow the rule!" See Coopers and Lybrand, supra, 437 U.S. at 476 (Merrell-Richardson, supra at 436).

The facts present in the instant action do not warrant overturning the strong policies, set forth below, in favor of upholding the Section 1291 final judgment rule. The right to enforce the forum selection clause, buried deep within the Achille Lauro passenger ticket in tiny type (17a), remains open, and thus no

grounds for an immediate appeal exist. See Cohen, supra, 337 U.S. at 546.

Discussing the import of preserving the effectiveness of the final decision rule of 28 U.S.C. Section 1291, the Supreme Court, in Mitchell v. Forsyth, 472 U.S. 511, 544, 86 L. Ed. 2d 411, 105 S.Ct. 2806 (1985), stated:

> "The rule respects the responsibilities of the trial court by enabling it to perform its function without a court of appeals peering over its shoulder every step of the way. It preserves scarce judicial resources that would otherwise be spent in costly and time-consuming appeals. Trial court errors become moot if the aggrieved party nonetheless obtains a final judgment in his favor, and appellate courts need not waste time familiarizing themselves anew with a case each time a partial appeal is taken. Equally important, the final judgment rule removes a potent weapon of harassment and abuse from the hands of litigants." (emphasis added).

The decision of the District Court, in the instant action, must not be disturbed prior to a full determination on the merits. The District Court must not be continually burdened by the Court of Appeals "peering over its shoulder" occasioned by the piecemeal appeal pursued by defendants, for the ostensible purpose of harassment and delay.

As if grasping at a fistful of straws, petitioner, LAURO attempts to invoke the statutory exception to the finality doctrine contained in 28 U.S.C. Section 1292(a)(1) which allows appeals of interlocutory orders that deny or otherwise pertain to injunctions. By some inexact analogy, the defendant would have this Court entertain the notion that the denial of a motion to dismiss due to the existence of a forum selection clause is akin to an injunction. As stated by the

Court of Appeals in the instant action: "We do not regard the denial of a motion to dismiss on forum-selection grounds as the equivalent of the denial of a motion for an injunction within the meaning of Section 1292(a)(1). (13a). Even if the denial of such a motion was somehow identical to the denial of an injunction, as stated by the Supreme Court in Stringfellow v. Concerned Neighbors in Action, supra, at 1184:

> "This Court has made it clear that not all denials of injunctive relief are immediately appealable; a party seeking review also must show that the order will have a 'serious, perhaps irreparable, consequence' and that the order can be 'effectually challenged' only by immediate appeal." Carson v. American Brands Inc., 450 U.S. 79, 84, 101 S.Ct. 993, 996, 67 L. Ed. 2d 59 (1981) [quoting Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181, 75 S.Ct. 249, 252, 99 L. Ed. 233 (1955)] (emphasis added).

As previously set forth, the ACHILLE LAURO, as well as the other defendants, can challenge the District Court's order denying the motion to dismiss following a trial. And, indeed, there has been no showing that any irreparable harm will result by foregoing an immediate appeal. Accordingly, Section 1292(a)(1) is not available as an avenue by which to appeal.

In its petition for a writ of certiorari, petitioner, LAURO LINES, attempts to depict that a conflict exists between the decisions of "five Courts of Appeals" with respect to whether the denial of a motion to dismiss on the basis of a forum selection clause is appealable as a collaterally final order (10). A close reading of the cases cited by defendant in support of this argument reveals that the alleged "conflict"

between the circuits is nothing more than a smoke screen set up by defendant in order to allure this Court into exercising its discretion to review the instant writ.

The Third Circuit's decision in General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352 (3rd Cir. 1986) was predicated on the decision of the divided panel in Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190 (3rd Cir.), cert. denied, 464 U.S. 938 (1983), and embodied a recognition that orders denying a pre-trail motion to enforce a forum selection clause are immediately reviewable by courts of appeal. 783 F.2d at 355. However, it is important to emphasize the differences between the facts underlying the Third Circuit's decision in both General Engineering and Coastal Steel and

the facts in the instant action. In General Engineering the dispute was between Martin Marietta Alumina, an owner of an aluminum plant, and General Engineering, a contractor that had been awarded "a construction contract for the installation of electrical equipment." 783 F.2d at 354-55. The construction contract included a clause in which the parties, sophisticated businesses each, agreed to litigate all actions in the "courts of the State of Maryland." Id. at 354. In Coastal Steel, the dispute again was between commercial entities, stemming from the construction of "an in-line steel working plant in turn-key condition." 709 F.2d at 192. In Coastal, the contract provided for the resolution of disputes "by the English Courts of Law." Id. at 193.

In the instant action, by

contrast, the dispute is between passengers on a cruise ship and the vessel's owners. Rather than a contract negotiated at arm's length between commercial parties of equal standing culminating in the signing of a mutually agreed upon contract, the passenger ticket supplied by defendant, ACHILLE LAURO, was an effort to unilaterally impose upon the plaintiffs the boilerplate language, in tiny type (17a), of the forum selection clause in an attempt to limit suit to Naples, Italy. In short, the equitable considerations underlying the Third Circuit's decisions in Coastal Steel and General Engineering are entirely absent from the instant action. Thus, on the facts alone, the Third Circuit's doctrine of appealability is not applicable.

In Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860 (7th Cir.

1984), the Seventh Circuit refused to entertain an appeal from an order denying a remand to the Circuit Court of Cook County, which had been designated in a contract forum selection clause. The panel emphasized that the district court's order, which refused to enforce the clause, "will be reviewable on appeal from a final judgment". Id. at 862. The Seventh Circuit specifically refused to follow the Third Circuit's decision in Coastal Steel. Id. at 863-864.

In a similar case, the Fifth Circuit refused to enforce a contractual forum selection clause through an appeal of an order denying a motion to dismiss for improper venue. Louisiana Ice Cream Distributors, Inc. v. Carvel Corp., 821 F.2d 1031, 1033 (5th Cir. 1987). The Court concluded that the three-prong test of the collateral order doctrine was not

satisfied. Id. at 1033-1034. Again, the Court noted the Third Circuit's decision in Coastal Steel but refused to follow it. Id. at 1033 & n.2.

Indeed, the Eighth Circuit, the only other federal appeals court to entertain an appeal from an interlocutory order refusing to endorse a forum selection clause, conceded it did "not completely follow the rationale of Coastal Steel." Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 850 (8th Cir. 1986). It reasoned, instead, that the parties had bargained for one trial of their dispute and that a denial of an "immediate appeal of this issue will effectively deprive them of a contractual right." Id. at 850-51. This reasoning has been upset by the Supreme Court's subsequent decision in Stringfellow, which set forth that so long

as post-trial review of a pre-trial order is available, a collateral order appeal is not warranted. 107 S.Ct. at 1182-83. See also Carlenstolpe v. Merck & Co., 819 F.2d 33, 36-37 (2d Cir. 1987) (expense of litigation and "right not to proceed to trial in an inconvenient forum" do not satisfy third element of test for appealability as a collateral order); Nascone v. Spudnuts, Inc., 735 F.2d 763 (3d Cir. 1984) (order granting motion to transfer based on forum selection clause not an appealable collateral order; decision in Coastal Steel distinguished).

In view of the specific facts in the instant action, the decisions of the various circuits are not in conflict - no immediate appeal has ever been granted for the denial of a motion to dismiss on the basis of a forum selection clause involving passengers, not sophisticated

corporate entities, on a cruise ship. This is especially so since LAURO LINES can appeal the Order of the District Court denying the motion to dismiss following a disposition on the merits.

CONCLUSION

By reason of the foregoing, LAURO LINES' Petition for a Writ of Certiorari should be denied.

Respectfully submitted

MORRIS J. EISEN, P.C.
Attorneys for Plaintiffs
233 Broadway
New York, New York 10279
(212) 341-8300

MORRIS J. EISEN,
ARTHUR M. LUXENBERG
KENNETH A. SCHACHTER
Of Counsel

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RAYMOND A. CONNELL
29 Broadway
New York, New York 10006
(212) 943-3980
Counsel of Record

JOHN R. GERAGHTY
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980
Of Counsel

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION OF LAURO LINES S.R.L. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The question presented for review is whether an order of a United States District Court denying enforcement of a

foreign forum selection clause is appealable as a collateral final order. Lauro Petition, i.

Briefs in opposition to the Petition were filed by the Chasser respondents* (the Chasser Brief) and by the Klinghoffer respondents** (the Klinghoffer Brief).

The opposition briefs prematurely argue the merits, Chasser Brief, 12-23, deny a conflict among the circuits -- "the alleged 'conflict' between the circuits is nothing more than a smoke screen set up by [Petitioner Lauro]," Chasser Brief, 23-24; see also Klinghoffer Brief, 3-7; and contend that if there is a conflict, it "is permissible pursuant

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* Sophie Chasser, Viola and Seymour Meskin, Paul and Evelyn Weltman, Silvia Sherman and Anna Schneider.

** Ilsa and Lisa Klinghoffer.

to the rule making power afforded the various appellate courts under 28 U.S.C. § 2071." Klinghoffer Brief, 7-10.

POINT I

THE CIRCUIT COURTS ARE IN CONFLICT ON THE QUESTION OF THE RIGHT TO IMMEDIATE REVIEW OF A DISTRICT COURT ORDER DENYING ENFORCEMENT OF A FOREIGN FORUM SELECTION CLAUSE

The Petition of Lauro Lines s.r.l. ("Lauro") is based upon Rule 17.1(a) of the Supreme Court which identifies as one of the character of reasons for the exercise of discretion to review by writ of certiorari:

> When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter...

Unquestionably, there is conflict among the circuits "on the same matter."

By its decision below, the United States Court of Appeals for the Second Circuit holds an order denying enforcement of a forum selection clause not appealable as a collateral final order. Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir. 1988). See also, Louisiana Ice Cream Distributors v. Carvel Corp., 821 F.2d 1031 (5th Cir. 1987) which indicates an order denying enforcement of a forum clause is not appealable as a collateral final order.

The United States Courts of Appeal for the Third and Eighth Circuits hold such orders appealable as collaterally final orders. Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190 (3d Cir.), cert. denied, 464 U.S. 938 (1983); In re Diaz Contracting, Inc., 817 F.2d 1047 (3d Cir. 1987); General Engineering Corp. v. Martin Marietta

Alumina, Inc., 783 F.2d 352 (3d Cir. 1986); Farmland Industries, Inc. v. Frazier Parrott Commodities, Inc., 806 F.2d 848 (8th Cir. 1986).

The United States Court of Appeals for the Seventh Circuit holds orders denying enforcement of foreign forum selection clauses within its appellate jurisdiction, but orders denying enforcement of domestic forum selection clauses are deemed outside its appellate jurisdiction. Rohrer, Hibler & Repogle, Inc. v. Perkins, 728 F.2d 860 (7th Cir.), cert. denied, 469 U.S. 890 (1984).

There is conflict. The conflict is expanding, and, as evidenced by the recent decision of the United States Court of Appeals for the Third Circuit in Hodes v. S.N.C. Achille Lauro, Docket Nos. 88-5086 and 88-5092 (September 22, 1988), the question of enforcement of

foreign forum selection clauses is a recurring one. A copy of the Third Circuit's decision in Hodes is annexed as Appendix I.

On July 6, 1988 Lauro filed its petition in this matter. An appeal was then pending before the United States Court of Appeals for the Third Circuit. The subject matter of the appeal was the denial by the United States District Court for the District of New Jersey of enforcement of the same forum selection clause involved in the action pending in the United States District Court for the Southern District of New York. See Lauro's Petition, 18-19.

On September 22, 1988 the United States Court of Appeals for the Third Circuit re-affirmed its jurisdiction to hear appeals from orders denying enforcement of forum selection clauses:

> We find that an order denying a motion to dismiss an action in order to enforce a forum selection clause has the effect of denying an injunction, resolves an important legal right ... and can be effectively challenged only by immediate appeal.

Hodes, supra, at 8.

The Third Circuit then reversed the order of the United States District Court for the District of New Jersey, and directed the District Court enforce the forum clause:

> For the errors now assigned to the trial court, its decision not to enforce the foreign forum selection clause will be reversed and this suit remanded to that court with directions to dismiss the action brought by the Hodeses. Appellees may pursue their action in Italy.

Id. at 26.

The proper enforcement of forum selection clauses in the federal system has been a matter of repeated concern by this Court. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Scherk

v. Alberto-Culver Co., 417 U.S. 506 (1974); Stewart Organization, Inc. v. Ricoh Corp., 108 S.Ct. 2239 (1988).

The question of appellate jurisdiction to review district court orders denying enforcement of a forum selection clause is an important one. Its resolution should be uniform throughout the circuits.

In this case, in connection with suits commenced in the United States District Court for the Southern District of New York by passengers on board the ACHILLE LAURO at the time of her hijacking by PLO terrorists in October, 1995, the United States Court of Appeals for the Second Circuit held it lacked appellate jurisdiction to hear an appeal from an order of the District Court denying enforcement of the forum clause contained in the passengers' ticket contracts.

Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir. 1988).

However, the United States Court of Appeals for the Third Circuit, accepting appellate jurisdiction, reversed an order of the United States District Court for the District of New Jersey denying enforcement of the very same forum selection clause, and directed the Hodes plaintiffs, also former passengers on the ACHILLE LAURO at the time of her hijacking, to pursue their remedy before the courts of Italy in accordance with the forum selection clause contained in their ticket contracts.

CONCLUSION

The conflict on the right to immediate review of an order denying enforcement of a foreign forum clause is "inescapable." 469 U.S. 890 (1984) (dissent of Justice White, joined in by Justice Brennan, from

denial of petition for writ of certiorari in Rohrer, Hibler & Replogle, Inc. v. Perkins, supra). It is respectfully submitted this petition should be granted so that conflict can be resolved.

Dated: October 4, 1988

Respectfully submitted,

RAYMOND A. CONNELL
Attorney for Petitioner
29 Broadway
New York, New York 10006
(212) 943-3980

JOHN R. GERAGHTY
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980

Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-5086 and 88-5092

FRANK R. HODES
MILDRED HODES
vs.
S. N. C. ACHILLE LAURO ED ALTRI-GESTIONE
MONTONOAVE ACHILLE LAURO IN
AMMINISTRAZIONE STRAORDINARIA
and
COMMISSARIO OF THE FLOTTA ACHILLE LAURO IN
AMMINISTRAZIONE STRAORDINARIA
and
CHANDRIS (ITALY), INC.

Chandris, Inc.,
Appellant in No. 88-5086

FRANK R. HODES
MILDRED HODES
vs.
S. N. C. ACHILLE LAURO ED ALTRI-GESTIONE
MONTONOAVE ACHILLE LAURO IN
AMMINISTRAZIONE STRAORDINARIA
and
COMMISSARIO OF THE FLOTTA ACHILLE LAURO IN
AMMINISTRAZIONE STRAORDINARIA
and
CHANDRIS (ITALY), INC.

Lauro Lines s.r.l.,
Appellant in No. 88-5092

On Appeal From the United States District
Court For the District
of New Jersey (Newark)
(Civil Action No. 86-1381)

Argued June 22, 1988

BEFORE: GIBBONS, *Chief Judge*,
and HIGGINBOTHAM, *Circuit Judges*,
and ROTH, *District Judge*•

(Opinion Filed September 22, 1988)

Daniel J. Dougherty (Argued)
Kirlin, Campbell & Keating
85 Bloomfield Avenue
Caldwell, NJ 07006

Attorneys for Appellant in No.
88-5086 -- Chandris, Inc.

John R. Geraghty
Raymond A. Connell (Argued)
Healy & Baillie
333 South Washington Avenue
Bergenfield, New Jersey 07621

Attorneys for Appellant in No.
88-5092 -- Lauro Lines S.R.L.

• Honorable Jane R. Roth, United States District Judge for the District of Delaware, sitting by designation.

Stanley M. Brand
Abbe David Lowell
Sean Connelly (Argued)
Brand & Lowell
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Attorneys for Appellees

OPINION OF THE COURT

ROTH, *District Judge*.

Appellants, defendants below, contest the refusal of the district court to enforce a foreign forum selection clause contained in a cruise ship ticket, purchased by appellees, plaintiffs below, Mildred and Frank Hodes. Finding that the clause satisfies the "reasonable communicativeness" test this court set forth in *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir.), *cert. denied*, 108 S.Ct. 155 (1987), and that its enforcement would not violate the principles the Supreme Court set forth in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), we hold the foreign forum selection clause should be enforced and thus reverse the decision of the lower court.

I.

This suit arises out of the terrorist hijacking of the *Achille Lauro*. The oceangoing Italian-flag vessel left Genoa, Italy, on October 3, 1985, scheduled to return to Genoa 11 days later. During its voyage, the *Achille Lauro* was to sail the Mediterranean Sea, calling at various ports. On October 7, 1985, off the coast of Egypt, Palestinian terrorists on board seized the vessel. They held the crew and some of the passengers hostage

for three days and killed one passenger, an American citizen. Appellee Mildred Hodes was on board the ship during its capture; her husband, Frank, had disembarked to tour Egyptian sights.

At the time of the hijacking, Achille Lauro ed Altri-Gestione M/N Achille Lauro s.n.c. ("ALA"), an Italian partnership, owned the *Achille Lauro*. ALA was one of a cluster of 19 Lauro entities, another being Societa di Fatto, Achille Lauro ed Altri Gestione Armatoriale Nava Noleggiate ("FAL"), also an Italian partnership. In February 1982, both ALA and FAL entered Italian reorganiation proceedings called Amministrazione Straordinaria On July 28, 1986, the entire cluster of Lauro entities, including ALA and FAL, were merged into one company, Lauro Lines s.r.l. ("Lauro Lines"). The merger was deemed retroactive to February, 1982.

On September 14, 1984, ALA chartered the *Achille Lauro* for a three-year period to a joint venture composed of FAL and Chandris S.A., a Greek corporation. The joint venture operated the vessel as a cruise ship in the Mediterranean. ALA provided the joint venture with blank passenger ticket contracts which were sold worldwide by Chandris and FAL. Included among the markets for which Chandris was responsible was the United States. A little over ten percent of the joint venture's advertising budget was allocated for the United States and Canada. Chandris S.A. retained Chandris, Inc., a Delaware corporation with its principal place of business in New York City, to distribute American tickets. However, only 4.7 percent of the passengers who sailed on the *Achille Lauro* during the joint venture charter were U.S. citizens. On the October 3, 1985 cruise, 72 of the 728 passengers were Americans.

The Hodeses became aware of the *Achille Lauro* cruises through a travel club, Club ABC Tours (the

"Club"), of which they were members. The Club was operated by a travel agency, Crown Travel Service ("Crown"). Crown and the Club were in no way affiliated with ALA, FAL, or Chandris. Crown received information from Chandris, Inc. on the *Achille Lauro* cruises and negotiated with Chandris, Inc. a price for passage for its members on them. The Club then offered 16-day Mediterranean cruises to its members. The package included air travel from New York to Italy and return, 11 days on the *Achille Lauro*, leaving from and returning to Genoa, and then three days in a hotel on the Italian Riviera. The cost of the package was $1699 per person plus $60 Port Taxes. The cost of the cruise portion of the package was $825 per person in a two-bed outside cabin. The Club offered 15 different cruise dates to its members. The Hodeses signed up for the tour which left New York for Genoa on October 2, 1985, and sailed from Genoa on the *Achille Lauro* on October 3. In total, 57 members of the Club were booked for that cruise.

The Club members paid the Club for the entire tour, the Hodeses paying $3,530.44 by check. The Club in turn remitted all ship passage fares for its members to Chandris, Inc. The Club then received from Chandris, Inc., the individual passenger tickets. Appellees allege they did not actually receive their tickets until "immediately before boarding the ship" in Genoa when a Club representative distributed them to the members. Nobody discussed the terms of the ticket with the Hodeses. Appellees "were totally unaware that [they] were waiving any legal rights simply by accepting the ticket."

The cover of the passenger ticket contained the statement: "IMPORTANT: Passengers attention is drawn to the Shipowner's terms and conditions printed inside." Among the terms and conditions were 32 fine print articles on the back of the ticket. Article

31 stated: "All controversies that may arise directly or indirectly in connection with or in relation to this passage contract must be instituted before the judicial authority in Naples, the jurisdiction of any other authority being expressly renounced and waived." Article 32 provided for application of Italian law to any contractual disputes.

As a result of the highjacking, appellees filed suit on April 7, 1986, claiming negligence, intentional infliction of emotional distress, breach of the maritime law obligation to provide safe passage, and breach of contract and implied warranties. In essence, appellees charged that the defendants failed to provide adequate security. Appellees sought $5,000,000 to compensate Mildred Hodes, $1,500,000 to compensate Frank Hodes, and $10,000,000 punitive damages for "each plaintiff against each defendant." Appellants moved for dismissal. In the event the action was dismissed, appellants agreed to waive any statutory or contractual limitations on time for bringing suit and to appear and defend in the correct Italian forum if suit was brought within 90 days of dismissal. Upon referral, the Magistrate recommended that the court dismiss the complaint on the basis, *inter alia*, of the forum selection clause. The district court did not adopt that recommendation but held that the suit could proceed because the forum selection clause was unenforceable.

II.

This court exercises appellate jurisdiction over decisions refusing to dismiss an action in order to enforce a forum selection clause on three grounds: (1) as interlocutory decisions under 28 U.S.C. § 1292(a)(1); (2) as collaterally final orders under 28 U.S.C. § 1291; and (3) under the All Writs Act, 28 U.S.C. § 1651. *In re Diaz Contracting, Inc.*, 817 F.2d 1047, 1048 (3d Cir. 1987); *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 355-56 (3d Cir. 1986); *Coastal Steel Corp. v. Tilgham Wheelabrator, Ltd.*, 709 F.2d 190, 193-97 (3d Cir.), *cert. denied*, 446 U.S. 938 (1983). *See also Farmland Indus. v. Frazier-Parrott Commodities*, 806 F.2d 848, 850-51 (8th Cir. 1986). *Contra Chasser v. Achille Lauro Lines*, 844 F.2d 50 (2d Cir. 1988)[1]; *Rohrer, Hibler & Repogle, Inc. v. Perkins*, 728 F.2d 860, 862-64 (7th Cir.), *cert. denied*, 469 U.S. 890 (1984). *Cf. Nascone v. Spudnuts, Inc.*, 735 F.2d 763 (3d Cir. 1984) (no appellate jurisdiction over a motion to transfer venue within the federal system based on a forum selection clause). In the words of Justice Kennedy, the "federal judicial system has a strong interest in the correct resolution of these questions [regarding enforcement of forum selection clause], not only to spare litigants unnecessary costs but also to relieve courts of time consuming pretrial motions." *Stewart Org., Inc. v. Ricoh Corp.*, 108 S.Ct. 2239, 2250 (1988) (Kennedy, J., concurring).

We note that, despite appellees' argument to the contrary, the recent Supreme Court decision in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S.Ct. 1133 (1988), does not deprive this court of § 1292(a)(1) jurisdiction. *Gulfstream Aerospace* did renounce the *Enelow-Ettelson* rule under which appellate courts automatically exercised jurisdiction over an order staying or refusing to stay proceedings issued in an action historically brought at law on the basis of a defense or counterclaim historically recognized by equity. *Id.* at 1138-43. *Enelow v. New*

1. This suit was brought in the Southern District of New York by seven passengers and executrices of two other passengers involved in the hijacking of the *Achille Lauro*. The district court denied a motion to dismiss on the basis of the forum selection clause and the Court of Appeals held that denial of the motion was not appealable under the collateral order doctrine.

York Life Ins. Co., 293 U.S. 379 (1935); *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942). Nevertheless, the Supreme Court has also ruled that appellate jurisdiction persists over orders that have the effect of denying an injunction if the party seeking review can "show that the order will have a '"serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal.'" *Stringfellow v. Concerned Neighbors In Action*, 107 S.Ct. 1177, 1184 (1987) *quoting Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) *quoting Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955). *See also Gulfstream Aerospace*, 108 S.Ct. at 1142-43. We find that an order denying a motion to dismiss an action in order to enforce a forum selection clause has the effect of denying an injunction, resolves an important legal right, *Coastal Steel*, 709 F.2d at 195, and can be effectually challenged only by immediate appeal. *Id.* at 196-97. Accordingly, the demise of the *Enelow-Ettleson* rules does not preclude our review here under § 1292(a)(1).

III.

The question of whether terms and conditions of a cruise ship ticket were reasonably communicated to the passenger is a question of law for the court. The standard of review is plenary. *Marek v. Marpan Two, Inc.*, 817 F.2d 242, 244-45 (3d Cir.), *cert. denied*, 108 S.Ct. 155 (1987).

Plenary also is our review of the district court's ultimate decision refusing to dismiss this action in order to enforce the forum selection clause. *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 359 (3d Cir. 1986); *In re Diaz Contracting, Inc.*, 817 F.2d 1047, 1048, 1053-55 (3d Cir. 1987). *Compare Mercury Coal & Coke v. Mannesmann Pipe & Steel*, 696 F.2d 315, 318 (4th Cir. 1982) (implicitly

applying a *de novo* standard) and *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718, 722 (2d Cir. 1982) (same) with *Sun World Lines Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068 n.3 (8th Cir. 1986) (adopting abuse of discretion standard of review) and *Pelleport Investors v. Budco Quality Theatres*, 741 F.2d 273, 280 n.4 (9th Cir. 1984) (same). *Cf. Stewart Org. Inc. v. Ricoh Corp.*, 108 S.Ct. 2239, 2243 (abuse of discretion standard when reviewing motion to transfer).

IV.

A passenger ticket for an ocean voyage is a maritime contract. *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1886). Accordingly, whether ticket conditions form part of the passenger's contract and the effect such conditions should be afforded are matters governed by the general maritime, not the local state, law. Despite the appellees having originally filed this action under diversity jurisdiction, 28 U.S.C. § 1332(a), we are not constrained by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), to apply New Jersey law. Rather, "when a common law action is brought, whether in a state or in a federal court, to enforce a cause of action cognizable in admiralty, the substantive law to be applied is the same as would be applied by an admiralty court -- that is, the general maritime law." *Jansson v. Swedish Am. Line*, 185 F.2d 212, 216 (1st Cir. 1950) (Magruder, C.J.); *Siegelman v. Cunard White Star*, 221 F.2d 189, 192-93 (2d Cir. 1955) (Harlan, J.).[2]

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2. Applying the general maritime choice of law rules to this litigation, we find American general maritime substantive law controls the issues before us today. First, while the terms and conditions of the ticket apparently provide for application of Italian law, the preliminary question of whether a specific condition is incorporated into a ticket contract putatively entered into in the

V.

Our analysis of the applicable maritime law starts with *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir.), *cert. denied*, 108 S.Ct. 155 (1987). At issue in *Marek* was whether the plaintiff was constrained by ticket provisions requiring notice of injury within six and institution of suit within 12 months of the date of injury. To decide this issue, the court entered into "a pair of distinct legal examinations":

> One focal point is the adequacy of so-called "warning language," often found on the front cover of a cruise ticket, directing a passenger to read the particular terms inside the ticket. The other focal point is the ticket terms themselves, and concerns such physical characteristics as the location of the terms within the ticket, the size of the terms within the ticket, the size of the typeface in which they are printed, and the simplicity of the language they employ.

United States by an American citizen is one for American law to decide. *McQuillan v. "Italia" Societa per Azione di Navigazione*, 386 F.Supp. 462, 467 n. 11 (S.D.N.Y. 1974), *aff'd* 516 F.2d 896 (2d Cir. 1975); Restatement (Second) of Conflict of Laws § 187, Comment b (1971). To give effect to a choice of law provision "for the purpose of determining whether it and the other ticket conditions should be given effect obviously would be putting the barge before the tug." *DeNicola v. Cunard Line Ltd.*, 642 F.2d 5, 7 n.2 (1st Cir. 1981). Second, the decision to dismiss this action in order to enforce a foreign forum selection clause, implicating as it does an American public policy interest that litigants should not be unfairly relegated to distant courts, is governed by American law. For example, the Supreme Court in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), applied American general maritime law to decide whether a foreign forum selection clause should be enforced, despite contractual provision for London adjudication and presumably English law. *Id.* at 13, n. 15.

Neither party has argued that Italian law pertains to this question. *See* Fed.R.Civ.P. 44-1.

Id. at 245. The court then had to determine "whether, 'taken together, the various notices and provisions of this cruise ticket contract' suffice legally to give effect to the time limits it contains." *Id.* at 245, *quoting Lubick v. Travel Servs., Inc.*, 573 F.Supp. 904, 907 (D.V.I. 1983). To be legally sufficient, the ticket provisions had to meet a "practical 'standard of reasonable communicativeness.'" *Marek*, 817 F.2d at 245 *quoting Lipton v. Nat'l Hellenic Am. Lines*, 294 F.Supp. 308, 311 (E.D.N.Y. 1968).

Applying the reasonable communicativeness test, we find the foreign forum selection clause was incorporated into the appellees' contract for passage.

The ticket itself consisted of one 11 inch by 17 inch page, to which were stapled seven ticket coupons. The page was folded into thirds, creating a cover and enfolding the coupons. On the back of the page appeared 32 contractual conditions.

As for its warning language, on the cover, directly beneath a schematic design of the cruise ship, appeared the statement:

> IMPORTANT: Passengers attention is drawn to the Shipowner's terms and conditions printed inside.

The word "important" was printed in capital letters approximately 1/8 inch high; the rest of the statement was printed in upper and lower case letters, with the capitals again 1/8 inch high. The statement was clearly legible. Save for a similar admonition in Italian, and an identification of the carrier, this was the only wording on the ticket cover. Its starkness contributed to its readability. The unfolded back page, the top half in Italian, the bottom half in English, containing the 32 Articles, was headnoted in approximately 1/8 inch boldfaced letters, "TERMS AND CONDITIONS OF CONTRACT OF PASSAGE AND BAGGAGE." The

headnote was absolutely clear. The Articles themselves were prefaced by a clause reading:

> The Company undertakes to transport the passengers and their baggage at [sic] the following conditions which the passenger -- owing to the mere fact of having booked and/or purchased the passage ticket -- implicitly states to know and undertakes to fully comply with.

And they were followed by a clause reading:

> The holder of this passage ticket, do[es] hereby declare to the effects [sic] and under provisions of art. 1341 and 1342 of the Italian Civil Code in force, that he is aware and adheres to all conditions and clauses set forth in this passage contract, and that he specifically approves clauses Nos. 1, 2, 3, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 23, 24, 25, 26, 27, 29, 30 and 32.

These clauses were in very small but readable print, less than 1/16 inch high. The ticket coupons themselves, in their lower lefthand corners, contained in print approximately 1/16 inch high the legible admonition: "This ticket is issued subject to the terms, conditions and regulations set out herein." Viewed in the aggregate, the ticket's warning language reasonably communicated to the Hodeses that their ticket formed a contract for passage, a contract incorporating the terms and conditions by which they were bound.

As for the foreign forum selection clause itself, Article 31 declared that "[a]ll controversies that may arise . . . must be instituted before the judicial authority in Naples, the jurisdiction of any other authority being expressly renounced and waived. . . ." Repeating our conclusion in *Marek*, although "the print is small, we have no trouble reading it, and the

paragraph is certainly not 'so muddled or illegible as to be unenforceable.'" *Marek*, 817 F.2d at 246-7 *quoting Gardner v. Greek Line*, 388 F.Supp. 856, 858 (M.D. Pa. 1975).

In sum, the foreign forum selection clause was reasonably communicated to the Hodeses. While our determination does contradict the ruling of the lower court and a similar bench ruling by the Southern District of New York, *Klinghoffer v. Achille Lauro*, 85 Civ. 9303 (S.D.N.Y. Oct. 21, 1987), *appeal dismissed sub nom. Chasser v. Achille Lauro Lines*, 844 F.2d 50 (2d Cir. 1988), we believe a straightforward application of *Marek* compels such. Furthermore, our decision today is in line with precedent, although extended comparison of the varying minutiae of tickets is a somewhat casuistic pursuit and courts must approach each individual case "carefully to determine whether the particular type of notice was reasonable in that particular situation." *Barbachym v. Costa Line, Inc.*, 713 F.2d 216, 220 (6th Cir. 1983). *Compare, DeNicola v. Cunard Line Ltd.*, 642 F.2d 5, 10-11 (1st Cir. 1981); *Carpenter v. Klosters Rederi*, 604 F.2d 11, 12-13 (5th cir. 1979); *Everett v. Carnival Cruise Lines*, 677 F.Supp. 269, 271-72 (M.D. Pa. 1987); *Strauss ex rel. Strauss v. Norwegian Caribbean Lines, Inc.*, 613 F.Supp. 5, 8 (E.D. Pa. 1984); *Lipton v. Nat'l Hellenic Am. Lines*, 294 F.Supp. 308, 309-10 (E.D.N.Y. 1968) (all finding ticket provisions reasonably communicated); *with Barbachym*, 713 F.2d at 220; *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11, 14 (2d Cir. 1968); *O'Connell v. Norwegian Caribbean Lines, Inc.*, 639 F.Supp. 846, 848-52 (N.D. Ill. 1986); *Raskin v. Compania de Vapores Realma, S.P.*, 521 F.Supp. 337, 341-42 (S.D.N.Y. 1981) (all finding ticket provisions not reasonably communicated). *See generally* Annotation, *Federal View as to Effect of Conditions Appearing on*

Back or Margin of Passenger's Ticket For Ocean Voyage, 5 A.L.R.Fed. 394 (1970).

Appellees would distinguish *Marek* not on the basis of the physical arrangement of the ticket but rather on the basis of the contract right at stake. *Marek* involved conditions regarding the timing of notice of injury and initiation of suit: this appeal involves forum selection. That distinction, appellees claim, is vital for two reasons. First, the injured passenger can avoid the time contraints by reading the ticket soon after injury and acting promptly; a forum selection clause cannot be similarly avoided. Second, because United States law, 46 U.S.C. § 183b(a), prohibits conditions that require notice of injury sooner than within six months of injury or initiation of suit sooner than within one year of injury, it can be said conditions that meet that law are implicitly endorsed. Forum selection clauses enjoy no such sanction.

The *Marek* court did take these considerations into account. *Marek*, 817 F.2d 244, 247, as have other courts. *See, e.g., Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 865-66 (1st Cir. 1983). Nevertheless, those considerations were not essential to our finding. Regarding tacit statutory approval, that consideration goes to whether a specific condition should be enforced, not whether it was reasonably communicated. Regarding the possibility of a post-accident reading to avoid a condition, if that was made a prerequisite for enforcement, few conditions would survive but for time limitations. Courts have not hesitated to administer the reasonable communicativeness test to determine the validity of conditions apart from time limitations, conditions which could not be avoided by a post-accident reading. *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F.Supp. 563 (S.D.N.Y. 1987) (foreign forum selection

clause); *Everett, supra* (domestic forum selection clause); *Wilkinson v.Carnival Cruise Lines, Inc.*, 645 F.Supp. 318 (S.D. Tex. 1985) (same); *Luby v. Carnival Cruise Lines, Inc.*, 1986 A.M.C. 2326 (D. Md. 1985) (same); *Cada v. Costa Line, Inc.*, 547 F.Supp. 85 (N.D. Ill. 1982) (limitation of liability for lost baggage). Courts have also enforced time limitation clauses where passengers had surrendered their tickets on boarding and, therefore, could not avail themselves of a post-accident reading. *See, e.g., Geller v. Holland-American Line*, 298 F.2d 618, 619 (2d Cir.); *cert. denied*, 370 U.S. 909 (1962); *cert. denied*, 370 U.S. 909 (1962); *McQuillan v. "Italia" Societa Per Azione Di Navigazione*, 386 F.Supp. 462, 464 (S.D.N.Y. 1974), *aff'd*, 516 F.2d 896 (2d Cir. 1975); *Murray v. Cunard S.S. Co.*, 235 N.Y. 162, 166-67 (N.Y. 1923) (Cardozo, J.). The essential inquiry remains whether the ticket reasonably communicated to the passenger the conditions of the contract of passage *before* the passenger boarded the vessel.

Appellees further argued that they did not receive their tickets until immediately before boarding the ship and, therefore, they had no effective opportunity to read the conditions of contract. Prior to the appellees boarding the *Achille Lauro*, the tickets had been held by Club ABC, the appellees' travel agent. In *Marek*, we found that a friend's "possession of the folder is sufficient to charge [plaintiff] with notice of its provisions." 817 F.2d at 247. This conclusion followed precedent in which possession by kith or kin of the plaintiff charged plaintiff with notice. *Foster v. Cunard White Star, Ltd.*, 121 F.2d 12, 13 (2d Cir. 1941) (brother); *Rogers v. Furness, Withy & Co.*, 103 F.Supp. 314, 316-17 (W.D.N.Y. 1951) (friend). The underlying question is whether someone has "acted in the capacity of an agent in acquiring the ticket for the plaintiff." *DeCarlo v. Italian Line*, 416 F.Supp. 1136,

1137 n.2 (S.D.N.Y. 1976). Club ABC considered itself the appellees' agent. Appendix at 27. In obtaining and safeguarding the Hodeses' tickets, the Club acted as their agents. The appellees have not suggested that Club ABC would have refused a request by them for the tickets had they made one. Accordingly, through their own and their agent's possession of the tickets, the appellees are charged with notice of the ticket provisions. *Cf. Muratore v. The Scotia Prince*, 845 F.2d 347, 352 (1st Cir. 1988) (individual passenger not charged with notice of conditions contained in single group ticket issued to tour leader).

VI.

Having found the foreign forum selection clause was incorporated into the *Achille Lauro* contract for passage, we must decide whether the clause should actually be enforced.[3]

In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Supreme Court addressed the question of whether a London forum selection clause contained in a commercial towage contract should be enforced. Retreating from the traditional American antipathy toward forum selection clauses and acknowledging the growth of international commerce, the Court held that forum selection clauses were "prima facie valid," *id.* at 9-10, and that, as Justice Kennedy subsequently described the decision, "a valid forum selection clause [should be] given controlling weight in all but the most exceptional cases." *Stewart Org., Inc. v. Ricoh Corp.*, 108 S.Ct. 2239, 2250 (1988) (Kennedy, J., concurring). In an opinion by Chief Justice Burger, the

3. In cases involving time limitation clauses, inquiry into enforcement is usually brief because the provisions of 28 U.S.C. § 183b can be straightforwardly applied. Because no statutory provisions govern foreign forum selection clauses, the question of enforcement here is more complex.

Court remanded *The Bremen* for further proceedings to afford Zapata, the party opposing enforcement of the foreign forum selection clause, an "opportunity to carry its heavy burden of showing not only that the balance of convenience is strongly in favor of trial in Tampa . . . but also that a London trial will be so manifestly and gravely inconvenient to Zapata that it will be effectively deprived of a meaningful day in court." 407 U.S. at 19. Alternatively, the Court allowed that a party might resist a foreign forum selection clause if it could clearly show that the contract resulted from "fraud, undue influence, or overweening bargaining power," *id.* at 12, or that "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id.* at 15.

Appellants would extend *The Bremen* to reach the *Achille Lauro* contract for passage and its Neapolitan forum selection clause. Appellees respond that a correct application of *The Bremen* works in their favor because (1) the *Achille Lauro* foreign forum selection clause was the result of overweening bargaining power, (2) its enforcement would contravene strong public policy, and (3) Neapolitan litigation would effectively deprive the appellees of a meaningful day in court. We analyze, and reject, those three arguments in turn.

The *Bremen* Court did take into consideration that the London forum selection clause it studied was the result of "an arm's length negotiation by experienced and sophisticated businessmen," 407 U. S. at 12, and "'not simply a form contract with boilerplate language that Zapata had no power to alter.'" *Id.* at n.14 *quoting* 428 F.2d 888, 907 (lower court dissent). In contrast, the Hodeses had little bargaining power and some jurists have characterized contracts of passage as contracts of adhesion. *See, e.g., Schwartz v. S.S. Nassau*, 345 F.2d 465, 470-71 (2d Cir.) (Kaufman, J.,

dissenting), *cert.denied*, 382 U.S. 919 (1965); *Siegelman v. Cunard White Star*, 221 F.2d 189, 204-6 (2d Cir. 1955) (Frank, J., dissenting). Nevertheless, while the appellants certainly enjoyed a superior bargaining position, they did not take unfair advantage of that position to "overween" the Hodeses. *See* Restatement (Second) of Conflict of Laws § 80 (1971) (forum selection clause "will be disregarded if it is the result . . . of the *unfair* use of unequal bargaining power (emphasis added)). In the words of Professor Ellinghaus, "[j]ust because the contract I signed was proffered to me by Almighty Monopoly Incorporated does not mean that I may subsequently argue exemption from any or all obligation: at the very best, some element of deception or substantive unfairness must presumably be shown." Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757, 766-67 (1969). *See Hoffman v. Nat'l Equip. Rental, Ltd.*, 643 F.2d 987, 991 (4th Cir. 1981) (that forum selection clause appeared in a "form contract used by a large corporation" did not *per se* render clause unenforceable).

The choice of Italian venue for disputes arising out of a cruise on an Italian vessel, departing from and returning to Italy, was a sensible and fair choice. *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972) (upholding New York forum selection clause where performance occurred in New York). Indeed, it was the most reasonable choice of venue, if a choice was to be made. And it was reasonable to choose a specific venue, given that the cruise attracted passengers from the world over and was scheduled to sail the high seas and call at several Mediterranean ports, exposing the appellants to many jurisdictions. The forum selection clause operated to dispel uncertainty as to where suit could be brought and assured the appellants they would not face global

litigation. *See, The Bremen*, 407 U.S. at 13-14. *Cf. D'Antuono v. CCH Computax Sys., Inc.*, 570 F.Supp. 708, 714-15 (D. R.I. 1983) (a national business has a "legitimate stake in not being required to defend lawsuits in far-flung fora"); *LFC Lessors, Inc. v. Pearson*, 585 F.Supp. 1362, 1364 (D. Mass. 1984) (same, noting use of consistent forum "will also promote uniformity of result").

For similar reasons it was appropriate to provide that Italian law govern the contract, *see* Article 32 of the Contract for Passage, a law best administered by Italian courts. *Cent. Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 345 (3d Cir. 1966) (upholding New York forum selection clause where New York law to be applied); *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1197 (4th Cir. 1985) (upholding Virginia state court forum selection clause where Virginia law to be applied).

We note this is not a case in which a consumer contracted to have a service rendered or buy a product in his/her home jurisdiction only to later learn of the existence of a forum selection clause. *See Yoder v. Heinold Commodities, Inc.*, 630 F.Supp. 757 (E.D. Va. 1986) (refusing to enforce forum selection clause contained in brokerage services contract), *contra Deolalikar v. Murlas Commodities, Inc.*, 602 F.Supp. 12 (E.D. Pa. 1984); *Horning v. Sycom*, 556 F.Supp. 819 (E.D. Ky. 1983) (refusing to enforce forum selection clause contained in computer sales contract), *contra D'Antuono, supra*. Appellees here contracted for a service to be rendered abroad, the Mediterranean cruise, exposing themselves to foreign law and possibly venue. While they did not specifically bargain over this clause, they are "presumed to have received appropriate consideration, in the form of a lower price, for the venue selection clause." *Intermountain Sys., Inc. v. Edsall Const. Co.*, 575 F.Supp. 1195, 1197 (D.

Colo. 1983); *see also Cent. Contracting*, 367 F.2d at 344. Having found the appellants exercised a reasoned choice in selecting Neapolitan venue, we will not scuttle that choice on the basis of disparate bargaining power. *See Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F.Supp. 563 (S.D.N.Y. 1987) (enforcing Greek forum selection clause contained in contract for passage against American plaintiffs injured on cruise starting and ending at Piraeus).[4]

Appellees next argue that the public policy perpetuated by the law of the forum, *i.e.*, the public policy of American maritime law, precludes enforcement of the foreign forum selection clause, referring to *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1968) (en banc). In *Indussa*, Judge Friendly refused to enforce a Norwegian forum selection clause, contained in bills of lading, against an American plaintiff. Unlike the instant litigation, *Indussa* involved the carriage of goods, not the passage of people, and thereby the statutory regime of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1300-15. Specifically, the Court sought to vindicate § 3(8) of COGSA which forbids any "clause, covenant, or agreement in a contract of carriage . . . lessening [the carrier's liability for negligence, fault, or dereliction of statutory duties] otherwise than as provided in this chapter." To enforce a foreign forum selection clause, according to Judge Friendly, would

4. Appellees rely on *Consumers Power Co. v. Curtiss-Wright Corp.*, 780 F.2d 1093 (3d Cir. 1988), to support their argument against enforcement of the forum selection clause. *Consumers Powers* is distinguishable. In it, there was "no evidence that Consumers Power ever received the brochure [containing the limitation of liability that the defendant sought to be enforced], much less that it read and consented to its contents." *Id.* at 1096-97. Here, appellees received a contract for passage that reasonably communicated its terms and conditions, among them the foreign forum selection clause.

have the practical effect of lessening carrier liability "quite substantially" because an American plaintiff would be intimidated by the prospect of foreign litigation and might then pliantly accept "settlements lower than if cargo could sue in a convenient forum." *Indussa*, 377 F.2d at 203. The Supreme Court has cabined *Indussa* to its COGSA parameters. *The Bremen*, 407 U.S. at 10, n.11. *See also Bense v. Interstate Battery Sys. or Am.*, 683 F.2d 718, 722 (2d Cir. 1982).

Appellees might nonetheless construct an analogous argument on the basis of 46 U.S.C. § 183c which forbids any "provision or limitation . . . purporting, in the event of loss of life or bodily injury arising from the negligence or fault of the [ship] owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury." Section 183c also forbids any provision or limitation purporting to "lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor." But the provisions of § 183c, like those of COGSA, are limited in their application to voyages that touch the United States. *Id.*; 46 U.S.C. § 1300. The law, and its policy, go no further. American maritime law as declared by statute does not avail the appellees.

Alternatively, appellees refer to public policy promulgated judicially. The judiciary, especially before passage of § 183c in 1936, has at times restricted, on public policy grounds, the ability of a carrier to limit its liability for negligent conduct. *See, e.g., The Arabic*, 50 F.2d 96, 99 (2d Cir. 1931); *The Oregon*, 133 F. 609, 630 (9th Cir. 1904); *Moses v. Hamburg-American Packet Co.*, 88 F. 329, 331 (S.D.N.Y. 1898), *aff'd* 92 F. 1021 (2d Cir. 1899). Most of these decisions, however,

anticipated not only the substance of Section 183c but also its jurisdictional scope -- the decisions dealt with carriers sailing to or from the United States. *Id.* Reaching beyond those bounds, the Second Circuit, in a case involving time limitations and thereby anticipating the substance if not the jurisdictional scope of 46 U.S.C. § 183b, applied American public policy to void a provision contained in a contract for voyage from Montreal to Liverpool. *Oceanic Steam Nav. Co. v. Corcoran*, 9 F.2d 724 (2d Cir. 1925). *See also Barndt v. Det Bergenske Dampskibsselskab*, 28 F.Supp. 815 (S.D.N.Y. 1938) (following *Corcoran*, applied American public policy to void a limitation of liability provision contained in a contract of passage for voyage from Bergen to Newcastle). The court acknowledged that the provision, requiring the passenger give notice of claim within three days of landing, was valid under the laws of England. *Id.* at 728. Nonetheless, the court, emphasizing the American passenger had bought her ticket in Boston, concluded that an "agreement made in this country, and which is contrary to public policy, no matter how solemnly it may have been made, is to that extent absolutely void and cannot be enforced." *Id.* at 733. That conclusion in and of itself we accept, *arguendo*, as correct. But the result of *Corcoran*, if not the "apex of unreason" the dissent characterized it, *id.* at 733 (Hough, J., dissenting), is unpersuasive. We simply do not believe American public policy reaches the provisions of a contract of passage for an entirely foreign voyage, even should the contract be entered into within the United States. Congress, in Sections 183b and 183c, delimited the reach of American public policy to contracts of passage for voyages that touch the United States; we refuse to supplement that Congressional choice with judicial embellishment.

Appellees protest that an Italian court might enforce provisions of the contract of passage that purport to limit the carrier's liability for passenger injury to $10,000[5] and completely absolve the carrier's liability for passenger injury arising out of acts of piracy.[6] Neither litigant has proferred an expert opinion on Italian law as to whether these clauses would actually be enforced. In any case, we adamantly refuse to wield the trump of American public policy. *Cf. The Bremen*, 407 U.S. at 9 ("We cannot have trade and commerce in world market and international waters exclusively on our terms, governed by our laws, and resolved in our courts"). American passengers simply do not carry American public policy on their backs wheresoever they may venture. We leave it for Italian law and Italian courts to allocate the liabilities of this Italian dispute.

In *The Bremen*, the Supreme Court similarly straitened American public policy. The Fifth Circuit had refused to enforce the London forum selection clause, expressing concern that an English court would accept clauses of the towage contract limiting the liability of the tower for its own negligence. *The Bremen*, 407 U.S. at 15. Enforcement thereof, the lower court found, would violate the *Bisso* doctrine, a judicially created American public policy against

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5. The contract of passage also refers to the applicability of the Athens Convention of 1974 which limits liability for personal injury to 700,000 francs (the "franc" being defined therein as a unit consisting of 65.5 milligrams of gold of millesimal fineness 900). Athens Convention of 1974, Arts. 7, 9, IMCO No. 75.03E (*entered into force* April 28, 1987), *reprinted in* 6 *Benedict on Admiralty* 2-9 (7th ed. 1988).

6. Whether the *Achille Lauro* hijacking constituted an act of piracy is a matter of controversy. *See Franck & Senecal, Porfiry's Proposition: Legitimacy and Terrorism*, 20 Vand. J. Transnat'l L. 195, 199 n.8 (1987).

towage contracts exculpating the tower's negligent conduct. *Id.*; *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955). To the contrary, the Supreme Court found that the lower court had overestimated American public policy. *The Bremen*, 407 U.S. at 15-16. In the opinion by Chief Justice Burger, the Court limited the reach of *Bisso* to contracts that would "'significantly encourage negligent conduct within the boundaries of the United States.'" *Id.* at 16 *quoting* 428 F.2d 888, 908 (lower court dissent). In the present appeal, we too observe the legitimate boundaries of American public policy. To rule the forum selection clause unenforceable on policy grounds would be to revisit the "parochialism" and "provincialism" that the Supreme Court decried in *The Bremen*. *Id.* at 9, 12.

Finally, appellees argue that "trial in the contractual forum will be so gravely difficult and inconvenient that [they] will for all practical purposes be deprived of [their] day in court," the third *Bremen* standard. *The Bremen*, 407 U.S. at 18. Appellees assert that the financial, linguistic, and cultural difficulties posed by an Italian lawsuit would prove insurmountable. We find, however, that these considerations, being but the obvious concomitants of litigation abroad, do not satisfy the *Bremen* standard. That standard is satisfied in the first instance if a litigant can show that he/she would face blatant prejudice in the foreign forum. For example, courts have refused to enforce foreign forum selection clauses that would send American litigants to the Islamic revolutionary courts of Tehran. *See, e.g., Continental Grain Export v. Ministry of War-Etka*, 603 F.Supp. 724, 729 (S.D.N.Y. 1984). Here, there has been no showing whatsoever that an Italian court would treat the appellees unfairly. American courts, in this regard, have not hesitated to relegate American litigants to

Italian justice. *See, e.g., Dukane Fabrics Int'l, Inc. v. The Hreljin*, 600 F.Supp. 202, 204 (S.D.N.Y. 1985) (enforcing Genovese forum selection clause); *Galaxy Export v. The Hektor*, 1983 A.M.C. 2637, 2641 (S.D.N.Y. 1983) (same). Alternatively, the *Bremen* standard may be satisfied if a litigant can show that enforcement of the foreign forum selection clause would be severely impractical. For example, this court in *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953 (3d Cir. 1978), considered whether a German forum selection clause should be enforced. The suit involved an alleged defect in an industrial plant. Ruling against enforcement of the clause, the lower court found that the plant was located in and had been constructed in the United States and would have to be inspected during the course of the trial; that many of the witnesses and much of the documentation were located in the United States; and that almost all of the witnesses were English speaking. *Id.* at 965, n.18. We affirmed. *Id.* at 965-66. In contrast, appellees' suit has few links to the United States but for their nationality and the fact that they bought their tickets here. On the other hand, Italy is where performance occurred and where appellants allegedly failed to provide adequate security. Italian will be the language of many, if not most, of the witnesses, members of the crew, or the local authorities. Overall, the practicalities of litigation weigh in favor of the Neapolitan forum. While it is far more convenient for the appellants to sue in Trenton rather than Naples, "this circumstance is not sufficient to justify allowing [appellees] to avoid the effect of the contract they entered into freely, providing for suit in the country where their cruise took place." *Hollander, supra*, 670 F.Supp. at 566. Finally, we observe that the appellants have stipulated to waive any statutory or contractual limitations on time of suit and to appear and defend in

the correct Italian forum, provided the appellees bring suit within 90 days of dismissal. Appellees therefore have failed to demonstrate that Neapolitan litigation would result in their being deprived of a meaningful day in court.

VII.

For the errors now assigned to the trial court, its decision not to enforce the foreign forum selection clause will be reversed and this suit remanded to that court with directions to dismiss the action brought by the Hodeses. Appellees may pursue their action in Italy.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(5)

No. 88-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

—v.—

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

RAYMOND A. CONNELL*
JOHN R. GERAGHTY
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980

Counsel for Petitioner

DANIEL J. DOUGHERTY*
KIRLIN, CAMPBELL & KEATING
14 Wall Street
New York, New York 10005
(212) 732-5520

Counsel for Respondent Chandris, Inc.

**Counsel of Record*

(counsel continued on inside front cover)

PETITION FOR CERTIORARI FILED JULY 6, 1988
CERTIORARI GRANTED OCTOBER 11, 1988

23pp

RUBIN, HAY & GOULD P.C.
205 Newbury Street
Framingham, MA 01701
(508) 875-5222
Attorneys for Respondent
Club ABC Tours, Inc., etc.

MORRIS J. EISEN*
MORRIS J. EISEN, P.C.
233 Broadway
New York, NY 10279
(212) 766-8200
Attorneys for Respondent
Sophie Chasser, et al.

STEVEN A. ARBITTIER*
WOLF, BLOCK, SCHORR, SOLIS-COHEN
12th Floor Packard Bldg.
Philadelphia, PA 19102
(215) 977-2000
Co-counsel for Respondent
Ilsa Klinghoffer, et al.

JAY D. FISCHER*
FISCHER, KAGAN, ASCIONE & ZARETZKY
Wall Street Plaza–25th Floor
New York, NY 10005
(212) 736-8185
Attorneys for Respondent
Estates of Marilyn & Leon Klinghoffer

WILLIAM P. LARSEN, JR.*
NEWMAN, SCHLAU, FITCH, BURNS, P.C.
305 Broadway, 9th Floor
New York, NY 10007
(212) 619-4350
Attorneys for Respondent
Donald Saire, et al.

**Counsel of Record*

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 27, 1985-Plaintiff Marilyn Klinghoffer's Summons and Complaint filed in U.S. District Court for the Southern District of New York. 85 Civ. 9303 (LLS).

Dec. 12, 1985-Petition filed for removal from New York State Supreme Court to the U.S. District Court for the Southern District of New York, Sophie Chasser and Anna Schneider v. Achille Lauro Lines, et al. 85 Civ. 9708 (LLS).

June 12, 1986-Plaintiffs Viola Meskin, Seymour Meskin, Sylvia Sherman, Paul Weltman and Evelyn Weltman's Summons and Complaint filed in U.S. District Court for the Southern District of New York. 86 Civ. 4657 (LLS).

August 14, 1986-Plaintiffs Donald E. Saire and Anna G. Saire's Summons and Complaint filed in the U.S. District Court for the Southern District of New York. 86 Civ. 6332 (LLS).

Nov. 17, 1986-Defendant Lauro Lines' Motion for an Order Dismissing the Complaint(s) pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure filed in U.S. District Court for the Southern District of New York.

Oct. 21, 1987-Transcript filed of decision by Judge Stanton denying Lauro's motion to dismiss, rendered in open Court.

Oct. 23, 1987-Memorandum endorsed by Judge Stanton denying Lauro's motion to dismiss.

Nov. 20, 1987-Defendant Lauro Line's Notice of Appeal filed.

April 7, 1988-Opinion of the United States Court of Appeals for the Second Circuit dismissing the appeal of Lauro Lines for want of appellate jurisdiction.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1987

(Argued: February 16, 1988 Decided: April 7, 1988)

Docket Nos. 87-9081, -9083, -9085, -9087, -9089, -9091

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE,

Plaintiffs-Appellees,

—v.—

ACHILLE LAURO LINES, THE LAURO LINES s.r.l., FLOTTO ACHILLE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, S.N.C. ACHILLE LAURO ED ALTRI-GESTIONE MOTONAVE ACHILLE LAURO IN AMMINISTRAZIONE STRAORDINARIA, COMMISSARIO OF THE FLOTA ACHILLE LAURO IN AMMINISTRAZIONE STRAORDINARIA, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS,

Defendants,

LAURO LINES s.r.l., CHANDRIS CRUISE LINES, CLUB ABC TOURS, INC., CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Defendants-Appellants.

Before:

KEARSE and MAHONEY, *Circuit Judges*, and GLASSER, *District Judge.**

Motion to dismiss appeals from an interlocutory order of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, denying motion of defendant Lauro Lines s.r.l. to dismiss actions on ground that contract provision required suit to be brought in Italy.

Motion granted.

MORRIS J. EISEN, P.C., New York, New York (Arthur M. Luxemberg, New York, New York), *for Plaintiffs-Appellees Sophie Chasser, Anna Schneider, Viola Meskin, Seymour Meskin, Sylvia Sherman, Paul Weltman, and Evelyn Weltman.*

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* Judge of the United States District Court for the Eastern District of New York, sitting by designation.

WOLF, BLOCK, SCHORR & SOLIS-COHEN, Philadelphia, Pennsylvania, (Fischer, Kagan, Ascione & Zaretsky, New York, New York), *for the Klinghoffer Plaintiffs-Appellees.*

WILLIAM P. LARSEN, Jr., New York, New York, (Newman, Schlau, Fitch & Burns, P.C., New York, New York), *for the Saire Plaintiffs-Appellees.*

RAYMOND A. CONNELL, New York, New York, (Healy & Baillie, New York, New York), *for Defendant-Appellant Lauro Lines s.r.l.*

KIRLIN, CAMPBELL & KEATING, New York, New York (Daniel J. Dougherty, New York, New York), *for Defendant-Appellant Chandris Cruise Lines.*

RUBIN, HAY & GOULD, P.C., Framingham, Massachusetts (Rodney E. Gould, Framingham, Massachusetts, A. George Koevary, Parker & Duryee, New York, New York), *for Defendant-Appellant Crown Travel Service, Inc., d/b/a Rona Travel and/or Club ABC Tours.*

KEARSE, *Circuit Judge*:

Defendants Lauro Lines s.r.l. ("Lauro"), *et al.*, appeal from an interlocutory order of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, denying Lauro's motion to dismiss the present actions on the basis of forum-selection clauses in

the ticket agreements between Lauro, owner of the cruise ship ACHILLE LAURO, and plaintiffs, who were or represent passengers on the ACHILLE LAURO. The clauses provided that any suit by passengers against Lauro was to be brought in Naples, Italy. Plaintiffs have moved to dismiss the appeals for lack of appellate jurisdiction. For the reasons below, we grant the motion.

BACKGROUND

Plaintiffs, citizens and residents of the United States, were passengers, or are the executrices of the estates of persons who were passengers, aboard the ACHILLE LAURO on a Mediterranean cruise in October 1985 when it was hijacked by terrorists of the Palestine Liberation Organization ("PLO"). The passengers were held captive and terrorized by the PLO, and they have brought the present actions, informally consolidated below, to recover damages for physical and psychological injuries and for the wrongful death of Leon Klinghoffer.

Lauro moved to dismiss the actions on several grounds, including the ground that a forum-selection clause in each passenger ticket required plaintiffs to bring these suits in Naples. The district court denied the motion to dismiss. With respect to the forum-selection clause, the court stated that the touchstone for enforceability was "whether the ticket reasonably communicates the importance of its contract provision." Transcript dated October 21, 1987 ("Tr."), at 3. The court described the "cover reference" to the forum clause as "unobtrusive" and noted that the clause itself appeared in "tiny type." *Id.* at 4. Further, the court noted that though the ticket provided that the passenger " 'specifically approves' " certain clauses, the forum-selection clause was not among them. *Id.* at 5. In

addition, though there was a place for the passenger's signature at the bottom of the contract, apparently none of the tickets was signed. In sum, while the district court termed the question of adequacy of notice a close one as to which reasonable persons might differ, *id.* at 4, it concluded that "as a whole . . . the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States," *id.* at 5. Accordingly, the court denied the motion to dismiss.

Lauro and two other defendants have appealed the court's refusal to dismiss on the basis of the forum-selection clause. Plaintiffs have moved to dismiss the appeals on the ground that the denial of the motion for dismissal is an interlocutory order that is not appealable under 28 U.S.C. § 1291 (1982). Lauro, which made no effort to have the court's denial on forum-selection grounds certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) (1982), argues that that denial is a final order insofar as it determines where the litigation will be conducted and that it is immediately appealable under § 1291 pursuant to the *Cohen* doctrine, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). We conclude that the order is not appealable and we therefore dismiss the appeals.

DISCUSSION

Section 1291 gives the courts of appeals jurisdiction to review "final decisons" of the district courts. 28 U.S.C. § 1291. The district court's denial of a motion to dismiss, which leaves the controversy pending, is not, technically, a final decision within the meaning of this section. *See, e.g.*,

Catlin v. United States, 324 U.S. 229, 236 (1945). The *Cohen* doctrine, on which Lauro here relies, is a judicially created exception that allows an immediate appeal from certain orders that are collateral to the merits of the litigation and that cannot be reviewed adequately after final judgment. As the Supreme Court has described it,

> [t]he collateral order doctrine is a "narrow exception," . . . whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. *See Helstoski v. Meanor*, 442 U.S. 500, 506-508 (1979); *Abney v. United States*, 431 U.S. 651, 660-662 (1977). To fall within the exception, an order must at a minimum satisfy three conditions: It must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgement."

Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430-31 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

The narrowness of the collateral order doctrine reflects judicial deference to Congress's preference against piecemeal appeals, as well as the recognition that judicial efficiency may be promoted by the denial of interim review because some interlocutory orders will have become moot by the time a final judgment is entered, either because the order is modified prior to final judgment, or because the party disadvantaged by the interlocutory order prevails in the action, or for some other reason. *See, e.g., Stringfellow v. Concerned Neighbors In Action*, 107 S. Ct. 1177, 1184 (1987) ("*Stringfellow*"); *Mitchell v. Forsyth*, 472 U.S. 511, 544 (1985) (Brennan, *J.*, concurring in part and

dissenting in part). The Court has made it clear that when an interlocutory order will be reviewable on appeal from a final judgment, the mere fact that ultimately it might appear that an interim reversal would have been more efficient, or that the party against whom the order is entered may have difficulty in persuading the appellate court to reverse after a final judgment, is not a reason to grant immediate review. In *Stringfellow*, for example, a party that had been allowed to intervene in an action on condition, *inter alia*, that it not assert new claims sought to appeal immediately from the imposition of conditions on its intervention. Though it conceded that it would have the right to review of the conditions upon appeal from the final judgment, it argued that the practicalities of complex and protracted litigation would make an appellate court reluctant to vacate the judgment on the basis of an erroneous intervention order. The Court was unpersuaded that this consideration should lead to disregard of the *Cohen* requirement of effective unreviewability on appeal from final judgment. As the Court succinctly stated in *Richardson-Merrell Inc. v. Koller*, "the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress." 472 U.S. at 436.

This Court too has generally been reluctant to apply the *Cohen* doctrine in an expansive fashion, "lest this exception swallow the salutory 'final judgment' rule." *Weight Watchers v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972); *see, e.g., Richardson Greenshields Securities, Inc. v. Lau*, 825 F.2d 647, 651 (2d Cir. 1987); *Carlenstolpe v. Merck & Co.*, 819 F.2d 33, 35-36 (2d Cir. 1987); *United States Tour Operators Ass'n v. Trans World Airlines*, 556 F.2d 126, 128 (2d Cir. 1977). For example, our decisions indicate that this doctrine does not permit

immediate appeals pursuant to § 1291 from orders denying motions to dismiss on grounds of improper venue, *see A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 442-44 (2d Cir. 1966), or forum non conveniens, *see Carlenstolpe v. Merck & Co.*, 819 F.2d at 35-36.

We have not previously considered the applicability of the *Cohen* doctrine to the denial of a motion to dismiss on the basis of a contractual forum-selection clause. Some of our sister circuits have concluded that such a denial is immediately appealable, *see Farmland Industries v. Frazier-Parrott Commodities*, 806 F.2d 848, 850-51 (8th Cir. 1986); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 193-97 (3d Cir.) ("*Coastal Steel*"), *cert. denied*, 464 U.S. 938 (1983), while others have concluded that it is not, *see Louisiana Ice Cream Distributors v. Carvel Corp.*, 821 F.2d 1031, 1032-34 (5th Cir. 1987); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 862 (7th Cir.), *cert. denied*, 469 U.S. 890 (1984). We are persuaded that the latter view is correct because we believe the refusal to dismiss on forum-selection grounds is not "effectively unreviewable on appeal from a final judgment."

The Third Circuit in *Coastal Steel* came to the conclusion that the district court's refusal to enforce a contractual forum-selection clause was unreviewable on appeal from a final judgment because 28 U.S.C. § 2105 (1982) provides that "[t]here shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." We do not agree that § 2105 makes a refusal to enforce a forum-selection clause unreviewable after final judgment or, if it did have that effect, that it would allow such a refusal to be reviewed at an earlier stage.

If § 2105 were to be taken literally and did preclude review of such denials after final judgment, we would be at a loss to understand how there could properly be interim review any more than review after final judgment, for "no reversal" has a rather categorical flavor. *Coastal Steel*'s rationale was that § 2105 could not have been intended to preclude interim review pursuant to the collateral order doctrine because that doctrine had not been devised in 1789 when the first progenitor of § 2105 was adopted. *See* 709 F.2d at 196. We find this rationale unpersuasive for two reasons. First, if Congress has indeed made a certain type of order immune from review, the courts simply are not free to ignore the congressional limitation. *See, e.g., Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976) (order remanding removed action to state court on grounds provided in 28 U.S.C. § 1447(c) (1982) is made unreviewable by *id.* § 1447(d), and thus may not be reviewed). Second, the *Cohen* doctrine, which interprets finality within the meaning of § 1291, is concerned with the timing of review; it assumes reviewability in principle and focuses on the practical difficulties entailed by postponement of review. The doctrine has not, to our knowledge, been used to review at any time an order of a type that Congress has made unreviewable in principle.

Further, assuming that § 2105 applies to forum-selection motions, if the section were taken literally, it would forbid review of even the granting of a motion to dismiss on forum-selection-clause grounds, for that section does not forbid reversals just of *denials* of motions in abatement; it forbids reversals of any nonjurisdictional "ruling" upon a matter in abatement. We have seen no authority supporting the proposition that such a dismissal, which would, of course, be a final decision in the litigation, is unreviewable.

It appears to us, however, that § 2105 is not to be taken literally. Commentators have called it "one of the most commonly ignored provisions of the Judicial Code," noting that its "most important feature . . . is certainly its disuse." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3903, at 412, 413 (1976). This seems an accurate observation, for assuming, as did *Coastal Steel*, 709 F.2d at 196, that "matters in abatement" means any (nonjurisdictional) ground for dismissal that would leave the parties free to pursue the suit in another forum, that category would appear to encompass matters such as motions to dismiss on grounds of improper venue or forum non conveniens; yet both grants and denials of those motions are commonly thought to be reviewable on appeal from final judgment. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (review of grant of forum non conveniens motion); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (same); *In re Air Crash Disaster*, 821 F.2d 1147, 1166-68 (5th Cir. 1987) (en banc) (reviewing denial of motion to dismiss for forum non conveniens), *petition for cert. filed* (U.S. Nov. 6, 1987) (No. 87-750); *Carlenstolpe v. Merck & Co.*, 819 F.2d at 35-36; *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967) (review of denial of motion to dismiss for improper venue); *Gill v. United States*, 184 F.2d 49, 50-51 (2d Cir. 1950) (same); *Corke v. Sameiet M.S. Song of Norway*, 572 F.2d 77 (2d Cir. 1978) (reviewing denial of motion to transfer venue); *Central Valley Typographical Union, No. 46 v. McClatchy Newspapers*, 762 F.2d 741, 744-46 (9th Cir. 1985) (reviewing both grant by first district court of a motion to transfer venue and denial by transferee district court of a motion to transfer to a third district).

We see no reason why denial of a motion to dismiss on the basis of a contractual forum-selection clause should be any less subject to correction upon appeal from a final judgment than are denials of motions for dismissal on grounds of improper venue or of forum non conveniens. The Supreme Court has held that a forum-selection clause in a commercial agreement "should control absent a strong showing that it should be set aside." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *see Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Such a clause thus grants an important right that should be recognized unless the party resisting enforcement shows the clause to be unreasonable. We would think, therefore, that if the district court has erroneously failed to enforce such a clause, its order may be reversed when the judgment is finally appealed.

Perhaps the most pertinent case decided by our Court is *Avis Rent A Car System, Inc. v. Garage Employees Union, Local 272*, 791 F.2d 22 (2d Cir. 1986), an appeal from a final judgment enforcing an arbitration award. The ground of the appeal was that the district court had refused to enforce a contract provision that required arbitrators to be selected in a certain way from among a certain group. Noting that "analogous contractual forum selection clauses are ordinarily binding and enforceable unless the party resisting them . . . shows them to be unreasonable," *id.* at 26, and ruling that no showing of prejudice was required by the party seeking enforcement of the clause, we reversed the judgment enforcing the award entered by the "wrong" arbitrator, and we remanded for entry of an order directing the parties to place their dispute before an arbitrator called for by the contract. Plainly, therefore, in the context of arbitration clauses, which are a type of forum-selection clause, this Court has viewed the

refusal to enforce as a matter that is fully reviewable on appeal from the final judgment.

We reject Lauro's suggestion that the right granted in a forum-selection clause, if enforceable, must be vindicated immediately or it is lost. It is a right to have the binding adjudication of claims occur in a certain forum; it is not a right of the same magnitude as a constitutional right to be free from double jeopardy, *see Abney v. United States*, 431 U.S. at 660-62, or the right to be free of any trial whatever, *see Mitchell v. Forsyth*, 472 U.S. at 530 (qualified governmental immunity); *Helstoski v. Meanor*, 442 U.S. at 506-08 (Speech and Debate immunity). The rights to escape any trial or any further trial are rights that would be lost unless vindicated at a pretrial stage. In contrast, the right to secure adjudication in a particular forum is not lost simply because enforcement is postponed. And, as noted above, the fact that postponing review may entail additional litigation expense has been explicitly rejected by the Supreme Court as a basis for immediate appeal.

Since we conclude that the district court's denial of Lauro's motion to dismiss on the basis of the forum-selection clause in the passenger tickets will be effectively reviewable on appeal from final judgment, we need not decide whether the first two *Cohen* requirements are met. We conclude that the order at issue here is not appealable under the collateral order doctrine.

Our recent decision in *Karl Koch Erecting Co. v. New York Convention Center Development Corp.*, Nos. 87-7306, *et al.*, slip op. 1431, 1434-36 (2d Cir. Feb. 3, 1988), does not suggest a contrary result. In *Karl Koch*, we held, relying on *Pelleport Industries v. Budco Quality Theatres*, 741 F.2d 273, 278 (9th Cir. 1984), that a district court's enforcement of a contractual forum-selection clause, by remanding a removed action to state court, was appealable under the *Cohen* doctrine. Unlike a refusal to enforce, with which we are presented here, the *Karl Koch* enforcement finally decided the forum-selection issue in a way that made the decision unreviewable on appeal from the final judgment simply because the litigation was no longer proceeding in federal court.

Finally, we reject Lauro's fall-back suggestion that we have jurisdiction of these appeals under 28 U.S.C. § 1292(a)(1) (1982). That section allows appeals of interlocutory orders that grant or deny (or otherwise deal with) injunctions. We do not regard the denial of a motion to dismiss on forum-selection grounds as the equivalent of the denial of a motion for an injunction within the meaning of § 1292(a)(1). Further, even if such a denial were tantamount to the denial of injunctive relief, we would grant the present motion to dismiss, for the Supreme Court "has made it clear that not all denials of injunctive relief are immediately appealable; a party seeking review also must show that the order will have a " 'serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" *only* by immediate appeal.' " *Stringfellow*, 107 S. Ct. at 1184 (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955))) (emphasis ours). *See also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 56 U.S.L.W. 4243 (U.S. Mar. 22, 1988). Since, for the reasons discussed above, we have concluded that meaningful appellate review of the present order will be available after final judgment, assuming that judgment is adverse to Lauro, § 1292(a)(1) provides no basis for immediate appeal of the present order.

CONCLUSION

We have considered all of Lauro's arguments in support of immediate appealability and have found them to be without merit. The appeals are dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9303

October 21, 1987
12:55 p.m.

LEON KLINGHOFFER, ET AL.,

Plaintiffs,

v.

ACHILLE LAURO, ET AL.,

Defendants.

Before:

HON. LOUIS L. STANTON,

District Judge

DECISION

APPEARANCES

JAY D. FISCHER,
MORRIS EISEN,

Attorney for Plaintiffs

LAWRENCE W. SCHILLING,
RAYMOND A. CONNELL,
DANIEL J. DOUGHERTY,
RODNEY GOULD,

Attorneys for defendants

[2] (In open court)

THE COURT: Thank you, gentlemen. And thank you all for excellent briefs on the points involved in this motion.

They have been expressed in writing and orally with clarity and vigor and style, and admirably cover the great variety of aspects involved.

In ruling on the motion in a somewhat laconic fashion, I do not wish to be taken as disregarding any of the areas presented in the papers or orally, but do so because I feel no jurisprudential purpose would be served by expanding my explanation beyond the points which I regard as decisive.

As to jurisdiction over Lauro, this question arises under New York's Long Arm Statute, which requires a showing of a continuous and systematic course of doing business here such as to warrant a finding of Defendant Lauro's presence in this jurisdiction.

Mere solicitation of business through an agent is not enough, although if solicitation is present, in any substantial degree, very little more is necessary to the conclusion that business is being done.

The argument presented on this motion, since it is common ground that solicitation of business was being done, lies in the fact that Lauro's agent for sales [3] and marketing here was Chandris, Inc., which had authority to confirm some cabins on the Achille Lauro, and which had been at least instrumental in part in obtaining for Crown Travel its authority to confirm other space.

In addition, Chandris, Inc., has been responsible for effecting changes in the Achille Lauro's itinerary, and in some degree to the accommodations of the vessel itself. Chandris, Inc., issued tickets for confirmed space, for money which was received and deposited in an account it maintained for Lauro's name, and Chandris, Inc., also handled at least on various occasions the adjustment of passenger complaints.

There are other activities alluded to, including the volume of passengers which was booked and the amount of money involved, but taken as a whole, those of Chandris, Inc.'s, activities are in themselves sufficient to bring Lauro within the

jurisdiction of this court, and that ground of the motion is rejected.

I turn now to the ticket condition, as it has been referred to, which is directed to Clause 31, and which raises a question over which the courts have enjoyed 90 years of litigation since The Majestic.

Under the cases, the touchstone is whether the ticket reasonably communicates the importance of its contract provision.

[4] In this case, that is a close question. It is one upon which reasonable jurists, lawyers, and laymen might differ.

On the one hand, arguing for giving effect to Clause 31, there are the facts that the reference on the cover is clear and noticeable, and preceded by the word in solid capital letters, "IMPORTANT."

The sheet containing what is stated to be the terms and conditions of contract of passage falls out of the ticket in a manner that attracts the passenger's attention to it, and, furthermore, as mentioned in at least one of the cases, there is the sensible understanding, that the passenger must be taken to understand, that these intricate provisions in Italian and English were not printed simply for the fun of it, but had legal meaning which affected the contract of passage.

On the other hand, the cover reference is unobtrusive rather than eye-catching. It merely draws attention to the ship owner's terms and conditions, and does not explicitly state that the ticket represents a contract affecting the passenger's substantial rights.

If its tiny type is read, Clause 31 carries an importance beyond the importance of clauses dealing with short statutes of limitation.

While a statute of limitations clause can be [5] examined after the accident when the importance of the contract as a whole is apparent to all, the effect of Clause 31 is immediately and irrevocably to divest the passenger's right to sue anywhere except before the judicial authority in Naples.

Yet, the contract is at least indirectly ambiguous on that point. For unlike the time limitation Clause 27, Clause 31 is not included in the list of clauses of which the passenger "specifically approves."

Finally, there is a place for the passenger's signature at the bottom of the contract, a provision which as far as appears has been entirely disregarded by both parties to the contract.

On the question, then, as a whole, I find that the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States.

That brings me to the final ground for the motion, the *forum non conveniens* argument, which is raised in a case in which there are in this forum Chandris, Inc., every plaintiff, of whom all are United States citizens, and Crown Travel, and all the initial parties to the suit. The contract was made here and delivered here.

As against that arguing for transfer there are [6] three serious considerations offered. The first is the location of Lauro's crew witnesses. These matters always involve balancing. On balancing their travel here it would not appear to me to impose such a burden as to upset the plaintiff's choice of forum.

The other body of witnesses located in Italy, who have been referred to as the terrorists, do not appear to me to be so important to the issues in this case as to justify its transfer to Naples.

Finally, there is the question of the application of Italian law, and as to the ultimate application of Italian law in this action, I make no ruling at this time.

What issues Italian law might govern is a point as yet somewhat unclear, nor does there appear at this point any particular difficulty in ascertaining or applying Italian law to the extent it may properly be required, and, therefore, I do not find that that factor either separately or in concert with the others justifies transfer under *forum non conveniens*.

Accordingly, the motion is denied, and will be so endorsed for the reasons stated. Thank you very much.

(6)

No. 88-23

Supreme Court, U.S.
FILED
NOV 25 1988
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

—v.—

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

RAYMOND A. CONNELL*
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980

**Counsel of Record*

Attorney for Petitioner

JOHN R. GERAGHTY
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980

Of Counsel

PETITION FOR CERTIORARI FILED JULY 6, 1988
CERTIORARI GRANTED OCTOBER 11, 1988

QUESTION PRESENTED

Is an order of a United States District Court denying enforcement of a foreign forum selection clause appealable as a collateral final order?

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* The caption of the case in this Court contains the names of all parties. Petitioner does not have any corporate parent, subsidiary, or affiliate.

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No. 88-23

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

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v.

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a/ RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.

Respondents.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States

Court of Appeals for the Second Circuit, officially reported at 844 F.2d 50 (2d Cir. 1988), is printed in the Joint Appendix ("JA") at 3. The decision of the United States District Court for the Southern District of New York dictated in open court on October 21, 1987 and entered on October 23, 1987, not officially reported, is printed at JA, 17.

JURISDICTIONAL STATEMENT

The order below sought to be reviewed is dated April 7, 1988. It was entered April 7, 1988.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATEMENT OF THE CASE

Petitioner Lauro Lines s.r.l.

("Lauro Lines") is the successor to Achille Lauro ed Altri Gestione m/n "Achille Lauro" s.n.c. ("ALA") and Societa de Fatto Achille Lauro ed Altri Gestione Armatoriale Navi Noleggiate ("FAL"), partnerships whose offices were located at Via C. Colombo 45, Naples, Italy. ALA owned the Italian-flag ACHILLE LAURO. Since February, 1982 both partnerships were in Italian reorganization proceedings. On July 28, 1986 all members of the Lauro group, including these partnerships, were merged into one company, i.e., Lauro Lines s.r.l. The merger was deemed retroactive to February, 1982.

On September 14, 1984 ALA time chartered the ACHILLE LAURO to a joint venture composed of FAL and Chandris S.A. (Piraeus). The joint venture operated the Vessel as a cruise ship. Tickets

were sold to passengers in all parts of the world. Chandris S.A. (Piraeus) was responsible for the United States market. It retained Chandris, Inc. in New York to distribute tickets to interested travel agents and others.

In October, 1985 the ACHILLE LAURO was hijacked by terrorists while on a cruise in the Mediterranean. The cruise commenced at Genoa, Italy, and it was scheduled to terminate at that port. The ticket held by each passenger contained the following provision (the "Forum Clause"):

> Art. 31 -- VENUE OF JUDICIAL PROCEEDINGS -All controversies that may arise directly or indirectly in connection with or in relation to this passage contract, must be instituted before the judicial authority in Naples, the jurisdiction of any other authority being expressly renounced and waived . . . .

Beginning in November, 1985 certain American passengers, and the representa-

tive of a deceased passenger, brought a series of suits in the United States District Court for the Southern District of New York against Lauro Lines, Chandris, and Crown Travel Service, Inc. ("Crown"). Jurisdiction was based upon diversity of citizenship, 28 U.S.C. § 1332, and the actions were also within the District Court's admiralty jurisdiction. 28 U.S.C. § 1333.*

On November 17, 1986 Lauro Lines filed a motion for an order dismissing all actions against it on the grounds of

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* Specifically, the bases for jurisdiction were as follows: the Chasser action (85 Civ. 9708) (diversity of citizenship); the Klinghoffer action (85 Civ. 9303) (diversity of citizenship and the Death on the High Seas Act, 28 U.S.C. § 761 et seq.); the Saire action (86 Civ. 6332) (diversity of citizenship); the Meskin action (86 Civ. 4657) (no jurisdictional allegation in the complaint).

lack of New York in personam jurisdiction, the Forum Clause, and forum non conveniens. Defendants Chandris and Crown joined the motion to dismiss on the basis of the Forum Clause. Plaintiffs in all actions opposed the motion.

On October 21, 1987, following oral argument, the District Court denied Lauro Lines' motion. With respect to the Forum Clause, the District Court stated, in part:

> Under the cases the touchstone is whether the ticket reasonably communicates the importance of its contract provisions. In this case, that is a close question.
>
> It is one upon which reasonable jurists, lawyers, and laymen might differ.

JA, 19.

On October 23, 1987 the Order denying enforcement of the Forum Clause was entered by the District Court.

On November 20, 1987 Lauro Lines filed its Notice of Appeal to the United States Court of Appeals for the Second Circuit from that portion of the Order denying enforcement of the Forum Clause. Appellate jurisdiction was invoked under the collateral final order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Chandris and Crown filed similar Notices of Appeal. All cases were consolidated for purposes of the appeal.

On January 29, 1988 the passengers filed a motion to dismiss the appeal for want of appellate jurisdiction.

On April 7, 1988 the United States Court of Appeals for the Second Circuit granted the motion for an order dismissing the appeal for lack of appellate jurisdiction, holding orders denying enforcement

of foreign forum selection clauses are not immediately appealable as collaterally final orders "because we believe the refusal to dismiss on forum-selection grounds is not 'effectively unreviewable on appeal from a final judgment.'" Chasser v. Achille Lauro Lines, 844 F.2d 50, 53 (2d Cir. 1988).

> We reject Lauro's suggestion that the right granted in a forum-selection clause, if enforceable, must be vindicated immediately or it is lost. It is a right to have the binding adjudication of claims occur in a certain forum; it is not a right of the same magnitude as a constitutional right to be free from double jeopardy, see Abney v. United States, 431 U.S. at 660-62 . . . or the right to be free of any trial whatever, see Mitchell v. Forsyth, 472 U.S. at 530 . . . (qualified governmental immunity); Helstoski v. Meanor, 442 U.S. at 506-08 . . . (Speech and Debate immunity). The rights to escape any trial or any further trial are rights that would be lost unless vindicated at a pretrial stage. In contrast, the right to secure adjudication in a particular forum is not

> lost simply because enforcement is postponed. And, as noted above, the fact that postponing review may entail additional litigation expense has been explicitly rejected by the Supreme Court as a basis for immediate appeal.

844 F.2d at 55.

SUMMARY OF ARGUMENT

There is a strong federal policy limiting appeals to those "final decisions" of the United States District Courts that terminate the action. Gulfstream Aerospace Corp. v. Mayacamus Corp., 485 U.S. ____, 108 S.Ct. 1133, 99 L.Ed.2d 296, 304 (1988).

However, this Court has long recognized that there are district court orders which "fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

The Order of the United States District Court for the Southern District of New York denying enforcement of the Forum Clause falls into this small class of collateral orders qualifying for immediate appellate review. The Order "conclusively determine[s] the disputed question"; it "resolve[s] an important issue completely separate from the merits of the action"; and, it is "effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 11-12 (1983).

There is a strong federal policy favoring enforcement of forum selection clauses. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). To parties bound by contract, the forum clause is often "a

vital part of [their] agreement," especially when parties of diverse nationality are involved. 407 U.S. at 14. Its very purpose is to restrict litigation to the agreed forum, before the chosen tribunal, and to free the contracting parties from exposure to being haled for trial before any other tribunal.

Orders denying enforcement of forum clauses simply cannot be effectively reviewed after judgment. By then the trial on the merits has already been had. Sterling Forest Associates, Ltd. v. Barnett-Range Corp., 840 F.2d 249, 253 (4th Cir. 1988); Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 850-51 (8th Cir. 1986); Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 196-97 (3rd Cir. 1983) cert. denied 464 U.S. 938

(1983); see also Abney v. United States, 431 U.S. 651 (1977); Helstoski v. Meanor, 442 U.S. 500 (1979).

Furthermore, as demonstrated by Hodes v. S.N.C. Achille Lauro, Nos. 88-5086, 88-5092, slip op. (3d Cir. September 22, 1988),* immediate appellate review of orders denying enforcement of forum clauses serves to spare the courts, and the parties, needless time and expense in what otherwise might be a vain act, namely trial before a tribunal barred by the clause.

It was recently stated in Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. ____, 108 S. Ct. 2239, 101 L.3d.2d 22 (1988):

*Hodes is reproduced as an Appendix to Lauro Lines' Reply Brief in Support of Petition for a Writ of Certiorari dated October 4, 1988.

> [E]nforcement of valid forum selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system. . . .
>
> The federal judicial system has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time consuming pre-trial motions. Courts should announce and encourage rules that support private parties who negotiate such clauses. . . .

101 L.Ed.2d at 33-34 (Kennedy, J., concurring).

There can be no more efficacious procedural safeguard for the encouragement of the use of forum clauses than immediate appellate review of district court orders refusing to enforce them. See Sterling Forest Associates, Ltd. v. Barnett-Range Corp., 840 F.2d 249 (4th Cir. 1988) (district court required to follow Bremen "despite any individual predilections it may have had.").

ARGUMENT

AN ORDER OF A UNITED STATES DISTRICT COURT DENYING ENFORCEMENT OF A FOREIGN FORUM SELECTION CLAUSE IS A COLLATERAL FINAL ORDER IMMEDIATELY APPEALABLE UNDER 28 U.S.C. § 1291

A. The Cohen Test

Generally, appeals are restricted to "final decisions of the district courts." 28 U.S.C. § 1291. However, § 1291 does not restrict appellate jurisdiction to only "those final judgments which terminate an action." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545 (1949). The exceptions permitted by 28 U.S.C. § 1292 for certain interlocutory orders, decrees and judgments, indicate a Congressional intention "to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties." Id.

In Cohen, the Court held immediately appealable an order denying a corporate defendant in a diversity action the benefit of a statute of the forum state requiring plaintiffs in stockholder derivative suits to post security for expenses. It did so "because [the order] is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." 337 U.S. at 546-47. The Court explained:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

337 U.S. at 546. See also Swift & Co.

Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684, 689 (1950) (finality not to "be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process"); Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964) (competing considerations are "inconvenience and costs or piecemeal review on the one hand and the danger of denying justice by delay on the other").

This Court has refined Cohen to establish a three-pronged test for determining whether an order which does not finally end the litigation is immediately appealable. See Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). First, the order must "conclusively determine the disputed question;" second, it must

"resolve an important issue completely separate from the merits of the action"; and third, it must "be effectively unreviewable from a final judgment." 437 U.S. at 468. An order satisfying these requirements qualifies as a collateral final order immediately appealable under § 1291. See Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 11-12 (1983).

B. Orders Denying Pretrial Motions to Dismiss Qualify for Immediate Appellate Review When the Very Authority of the Tribunal to Try the Defendant is Brought into Question.

In Abney v. United States, 431 U.S. 651 (1977), the Court held that an order denying a motion to dismiss an indictment on double jeopardy grounds satisfied the three-pronged Cohen test:

> Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we conclude that such orders fall within the "small class of cases" that Cohen has placed beyond the confines of the final judgment rule.

431 U.S. at 659.

First, the order conclusively determined the disputed question:

> [T]here can be no doubt that such orders constitute a complete, formal and, in the trial court, a final rejection of the criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee. Hence, Cohen's threshold of a fully consummated decision is satisfied.

431 U.S. at 659.

Second, the order resolved an important issue completely separate from the merits of the action:

> [T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's

impending criminal trial, i.e. whether or not the accused is guilty as charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. . . . Rather, he is contesting the very authority of the Government to hale him into Court to face trial on the charge against him. . . . Thus, the matters embraced in the trial court's pretrial order here are truly collateral to the criminal prosecution itself in the sense that they will not "affect, or . . . be affected by, decision of the merits of this case." . . .

431 U.S. at 659-60.

Third, the order was effectively unreviewable on appeal from a final judgment:

> Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same

crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments.

It is a guarantee against being twice put to <u>trial</u> for the same offense. . . .

Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. . . . Obviously, these aspects of the guarantee's protection would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid <u>exposure</u> to double jeopardy and thereby enjoy the full protection of the Clause,

> his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

431 U.S. at 460-62 (emphasis in original). See also, Helstoski v. Meanor, 442 U.S. 500, 508 (1979) (denial of motion for an order dismissing an indictment on the ground it violated the Speech or Debate Clause was subject to immediate appeal as a collateral final order); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) ("[W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.").

The collateral order exception of Cohen "is equally applicable in both civil and criminal proceedings." Abney

v. United States, 431 U.S. 651, 659 n.4. (1977). Indeed, Cohen, Swift, Gillespie and Moses H. Cone were all civil proceedings.

Moreover, in the civil context, state court decisions rejecting a party's federal law claim that it is not subject to suit before a particular tribunal are "final" for purposes of certiorari jurisdiction under 28 U.S.C. § 1257.

> This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 USC § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until

> the conclusion of the proceedings.

Mercantile National Bank v. Langdeau, 371 U.S. 555, 558 (1963). See also Local No. 438 Construction & General Laborers Union v. Curry, 371 U.S. 542, 549 (1963) ("The jurisdictional determination here is as final and reviewable as was the District Court's decision in [Cohen], exempting plaintiffs in a stockholder's suit filed in a federal court from filing a bond pursuant to a state statute.").

C. An Order Denying Enforcement of a Forum Clause Meets the Cohen Test for Immediate Appellate Review

In The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), this Court stressed the importance of forum clauses to the civil litigant:

> The expansion of American business and industry will hardly be encouraged

> if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

407 U.S. at 9.

When Americans venture abroad:

> Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter.

407 U.S. at 11-12.

The towage agreement in Bremen was between citizens of different countries; its performance involved "the waters of many jurisdictions;" and the tow could sustain damage "at any point along the route, and there were countless possible ports of refuge." 407 U.S. at 13. The importance of the forum clause was

obvious:

> Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.

407 U.S. at 13-14.

Thus, "in the light of present-day commercial realities and expanding international trade, we conclude the forum clause should control absent a strong showing that it should be set aside." 407 U.S. at 15. So strong is the policy

favoring enforcement that absent a strong countervailing public policy consideration, undue influence, or fraud, the burden is on the party seeking to avoid a forum clause to establish it "would be effectively deprived of its day in court should it be forced to litigate in [the chosen forum]." 407 U.S. at 18-19.

The forum clause here was part of a ticket contract. Like the clause in the towage agreement in Bremen, "[at] the very least, the clause [is] an effort to eliminate all uncertainty as to the nature, location, and outlook of the forum in which [the parties] of differing nationalities might find themselves." 407 U.S. at 13 n.15.

Forum clauses are especially important to cruise lines. They are placed in ticket contracts to ensure, among other

things, that in the event of an incident giving rise to multiple claims, all suits will be heard in one forum. There will be but one trial on each claim, held at the agreed location, before the chosen tribunal. All proceedings will be governed by a common procedure, and all claims will be judged by a common legal standard.

The order below denying enforcement of the Forum Clause falls squarely within that "small class" of orders placed by Cohen beyond the confines of the final judgment rule.

First, there is nothing "inherently tentative" about the Order -- it was "made with the expectation [it would] be the final word on the subject addressed." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 12 n.14 (1983). The Order constitutes "a com-

plete, formal and, in the trial court, a final rejection" of Lauro Lines' Forum Clause defense. There are simply no further steps that can be taken in the District Court to avoid the trial Lauro Lines maintains is barred by the Forum Clause. Abney v. United States, 431 U.S. 651, 659 (1977). In no sense did the Order leave the matter "open, unfinished or inconclusive." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

Second, the "very nature" of the Forum Clause is that it is collateral to, and separable from, the principal issue at trial, i.e., whether Lauro Lines is liable for the injuries alleged in the complaints. By arguing that the Forum Clause bars suit against it in the United States District Court for the Southern

District of New York, Lauro Lines "makes no challenge whatsoever to the merits of the [claim] against [it]." Abney v. United States, 431 U.S. 651, 659 (1977). Rather, Lauro Lines is contesting the authority of the passengers to hale it for trial before a court sitting in New York. See Abney, supra, 431 U.S. at 659.

Third, the rights conferred by the Forum Clause "would be significantly undermined if appellate review . . . were postponed until after [trial]." Abney, supra, 431 U.S. at 660. The very purpose of the Forum Clause is to ensure a single trial, at the selected forum, before the chosen tribunal to the exclusion of all others. It seeks to protect against exposure to litigation, with its concomitant stress, expense and publicity, before alien fora on claims

arising out of the agreement: "It thus protects interests wholly unrelated to the propriety of any subsequent [judgment]." 431 U.S. at 661. Consequently, if the Forum Clause is to provide an effective shield from exposure to suit in contractually excluded fora, an order denying its enforcement simply "must be reviewable before that . . . exposure occurs." 431 U.S. at 662. See also Helstoski v. Meanor, 442 U.S. 500, 507 (1979).

D. The Decisions of the United States Courts of Appeals on the Question of Immediate Review of District Court Orders Denying Enforcement of Forum Clauses.

Guided by Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), as refined by Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), and by the strong policy favoring

enforcement of forum clauses enunciated in The Bremen, 407 U.S. 1 (1972), the United States Courts of Appeals for the Third, Fourth and Eighth circuits have held an order denying enforcement of a forum clause qualifies for immediate appellate review as a collaterally final order. Coastal Steel v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 195-97 (3rd Cir. 1983), cert. denied 464 U.S. 938 (1983); General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 355-56 (3rd Cir. 1986); In re Diaz Contracting, Inc., 817 F.2d 1047, 1048 (3rd Cir. 1987); Hodes v. S.N.C. Achille Lauro, Nos. 88-5086, 88-5092, slip op. (3rd Cir. September 22, 1988); Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 850-51 (8th Cir. 1986); Sterling Forest Associates,

Ltd. v. Barnett-Range Corp., 840 F.2d 249, 253 (4th Cir. 1988).

The Second, Fifth, and Seventh circuits have also considered the question. The Second Circuit has unqualifiedly held such an order not subject to immediate appellate review. Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir. 1988). The Fifth Circuit, in Louisiana Ice Cream Distributors, Inc. v. Carvel Corp., 821 F.2d 1031 (5th Cir. 1987), held an order denying a motion to dismiss based upon a domestic forum clause was not immediately appealable, but it also noted that there were issues which were "intertwined inextricably with the merits of this litigation." 821 F.2d at 1033. The Seventh Circuit, in Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860

(7th Cir. 1984), cert. denied, 469 U.S. 890 (1984), held that denial of a motion for an order remanding the matter to a state court on the basis of a domestic forum clause was not immediately appealable, but it indicated the holding would be to the contrary if the motion was for an order dismissing the action on the basis of a foreign forum selection clause:

> Denial of a motion to remand to a state court presents a far less exigent set of circumstances than existed in Coastal Steel, where the issue was whether an American court was the appropriate forum for the litigation. Cf. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 . . . (1972), and the Court's discussion of the importance of foreign commerce. In contrast to Coastal Steel, where the applicable law (English or American) would differ depending on the forum in which the case was tried, the controlling law in the instant case, in its present posture, will be the same whether it is tried in the Northern District of Illinois, or the Circuit Court of Cook County.

728 F.2d at 864.

The Second Circuit in Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir. 1988) found "the district court's denial of Lauro's motion to dismiss on the basis of the forum selection clause in the passenger's ticket will be effectively reviewable on appeal from final judgment." 844 F.2d at 55. Distinguishing Abney, Mitchell, and Helstoski, the court found Lauro Lines' right to face trial only before the chosen tribunal in the agreed forum was not of the same magnitude as a Constitutional "right to be free from double jeopardy . . . or the right to be free of any trial whatever . . ." The Chasser court concluded Lauro Lines' "right to secure adjudication in a particular forum is not lost simply because enforcement is post-

poned," and, in view of this, the court further concluded it "need not decide whether the first two Cohen requirements are met." 844 F.2d at 55.

The rights in Abney (double jeopardy), Mitchell (qualified governmental immunity), and Helstoski (Speech or Debate immunity) are important, but for the purpose of immediate appellate review there is no requirement that the "small class" of Cohen orders be restricted to those raising issues of Constitutional magnitude. Cohen involved an order denying security, Swift an order vacating an attachment, Moses H. Cone an order staying a federal action pending resolution of the same issue of arbitrability by a state court; yet all qualified for immediate appellate review as collaterally final orders.

As recently stated by the Fourth Circuit, on the denial of enforcement of a forum clause, the first and second prongs of the Cohen test "are easily met":

> The district court's order conclusively determined the disputed question of transfer and, in so doing, resolved an important issue completely separate from the merits of the action.

Sterling Forest Associates v. Barnett Range Corp., 840 F.2d 249, 253 (4th Cir. 1988).

Addressing the third prong of the Cohen test, the Eighth Circuit in Farmlands Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848 (8th Cir. 1986), explained:

> After a final determination is made on the merits it will be too late effectively to review the present order because the contractual right to trial in Illinois will have been lost. Granted, defendants could raise the issue after a final

> determination on the merits and possibly gain a new trial in Illinois. However, a Missouri trial and appeal is not what was contemplated by the parties when they signed the contract; what was contemplated is single trial resolution of disputes in Illinois. Denying defendant's immediate appeal of this issue will effectively deprive them of a contractual right.

806 F.2d at 851; see also Sterling Forest Associates, Ltd. v. Barnett-Range Corp., 840 F.2d 249, 253 (4th Cir. 1988); Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 196-97 (3rd Cir. 1983).

The Chasser court lost sight of the fact the Forum Clause not only provided Lauro Lines a right to trial before a tribunal in Italy, it also provided Lauro Lines a right to be free from suit anywhere else.

Erroneous orders denying enforcement of a forum clause strip a civil litigant of its contracted for right not to be

haled for trial before tribunals outside the agreed forum. Following trial, it is too late to restore that right, even if the party denied enforcement ultimately prevails. If that party loses, its only solace would be a dubious chance to gain a reversal on appeal, which, if successful, would mean a second trial, this time in the correct forum. But a trial outside the agreed forum, and a possible appeal followed by yet another trial, is not what a forum clause contemplates. Such a clause contemplates a single trial, in the agreed forum, before the chosen tribunal. An order denying enforcement of a forum clause simply cannot be effectively reviewed after trial on the merits. As succinctly put in Sterling: "[T]he time to do it is now." 840 F.2d at 253.

E. Immediate Appellate Review is in Keeping with the Strong Federal Policy Favoring Enforcement of Forum Clauses

It was pointed out in Bremen:

> Forum selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were "contrary to public policy", or that their effect was to "oust the jurisdiction of the court." Although this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum-selection clauses. This view . . . is that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty . . . This approach is substantially that followed in other common-law countries, including England. It is the view advanced by noted scholars and that adopted by the Restatement of Conflict of Laws. It accords with ancient concepts of freedom of contract and reflects an appreci-

> ation of the expanding horizons of American contractors who seek business in all parts of the world ...

407 U.S. at 9-11.

In Stewart Organization v. Ricoh Corp., 487 U.S. _____, 108 S.Ct. 2239, 101 L.Ed.2d 22, 33-34 (1988), in a concurring opinion joined in by Justice O'Connor, Justice Kennedy observed: "enforcement of valid forum selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system . . . . Courts should announce and encourage rules that support private parties who negotiate such clauses . . . ."

Surely, the essential concomitant of this strong federal policy encouraging private parties to make use of forum clauses is the right of immediate

appellate review of district court orders denying their enforcement. See, e.g. Sterling Forest Associates, Ltd. v. Barnett-Range Corp., 840 F.2d 249, 252 (4th Cir. 1988) ("We think evidence of a continuing hostility to forum selection clauses is apparent not only in the district court's egregious misinterpretation of the clause at issue herein, but also in the manner in which the district court's holding was arrived at.").

CONCLUSION

The Order of the United States Court of Appeals for the Second Circuit dismissing for want of appellate jurisdiction the appeal of Lauro Lines from an Order of the United Stated District Court for the Southern District of New York denying enforcement of a foreign foreign selection

clause should be reversed, and the matter should be remanded to the United States Court of Appeals for the Second Circuit for the determination of Lauro Lines' appeal.

Dated: November 22, 1988

Respectfully submitted,

RAYMOND A. CONNELL
Attorney for Petitioner
29 Broadway
New York, New York 10006
(212) 943-3980
Counsel of Record

John R. Geraghty
LeRoy Lambert
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980

Of Counsel

QUESTION PRESENTED FOR REVIEW

Is an order of a United States District Court denying enforcement of a foreign forum selection clause appealable as a collateral final order?

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* The caption of the case in this Court contains the names of all parties. Respondent Chandris Inc., sued herein as "Chandris Cruise Line" and "Chandris (Italy) Inc.", does not have any corporate parent, subsidiary or affiliate.

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No. 88-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

—v.—

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, officially reported at 844 F.2d 50 (2d Cir. 1988), is printed in the Petition for Cert. at 1a-14a. The decision

of the United States District Court for the Southern District of New York, dictated in open court on October 21, 1987, not officially reported, is printed in the Petition for Cert. at 15a-18a.

JURISDICTIONAL STATEMENT

The order below sought to be reviewed is dated April 7, 1988. It was entered on April 7, 1988.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

Certiorari was granted on October 11, 1988.

STATEMENT

Respondent Chandris Inc., sued herein as "Chandris Cruise Line" and "Chandris (Italy) Inc." joins petitioner Lauro Lines s.r.l. in urging that the order of the district court denying enforcement of the passage ticket's forum selection clause is immediately appealable under the *Cohen* collateral order doctrine, *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949).

Chandris, Inc. hereby adopts the brief of the petitioner Lauro Lines s.r.l. and the factual statement contained therein.

SUMMARY OF ARGUMENT

An order denying enforcement of a passage ticket's forum selection clause satisfies the third prong of the *Cohen* "collateral order" test, because it is "effectively unreviewable at the conclusion of the litigation." The forum selection clause is not merely a "defense to liability," but is instead the anticipation that the parties will litigate their disputes in a particular, exclusive forum. By requiring a full adjudication on the merits of the unrelated tort claim, before an appeal on the enforceability of

the contract's forum selection, the Second Circuit has denied the parties an important contractual right.

Point 1

The District Court's Order is a Collateral Final Order Within the *Cohen* Doctrine and is Immediately Appealable.

The terms of a contractual forum selection clause are violated the moment a party brings an action in a forum other than that agreed upon. If that improper forum issues an order denying enforcement of the forum selection clause, an important contract right is lost. Absent immediate appeal, such an order is "effectively unreviewable at the conclusion of the litigation."

The quoted language is the third-prong of the *Cohen* Doctrine[1] as refined by this Court in *Coopers & Lybrand v. Livesay* 437 U.S. 463, 468 (1978).

Conceding a split among the circuits on this issue[2], the Second Circuit chose to follow the Seventh Circuit in holding that such an order fails to satisfy the third prong of this test.

Although citing the Eighth Circuit's decision in *Farmland Industries*, (supra. at note 2), the Second Circuit otherwise ignores it.

Farmland Industries contains the most concise and convincing reasoning why orders denying enforcement of forum selection clauses satisfy the third prong of the *Cohen/Cooper* Test:

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1 *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949).

2 The Second Circuit cited: *Farmland Industries v. Frazier-Parrott Commodities* 806 F.2d 848, 850-51 (8th Cir. 1986) and *Coastal Steel Corp v. Tilghman Wheelabrator, Ltd.* 709 F.2d 190, 193-197 (3rd Cir. 1983), cert. denied 464 U.S. 938 (1983) as examples of decisions concluding that orders denying forum selection enforcement are immediately appealable; and *Louisiana Ice Cream Distributors v. Carvel Corp.* 821 F.2d 1031, 1032-34 (5th Cir. 1987) and *Rohrer, Hibler & Replogle Inc. v. Perkins* 728 F.2d 860, 862 (7th Cir. 1984) cert denied 469 U.S. 890 (1984) as examples of decisions denying immediate appellate review.

> After a final determination is made on the merits it will be too late effectively to review the present order because the contractual right to trial in Illinois will have been lost. Granted, defendants could raise this issue after a final determination on the merits and possibly gain a new trial in Illinois. However, a Missouri trial and appeal is not what was contemplated by the parties when they signed the contract; what was contemplated is single trial resolution of disputes in Illinois. Denying defendants immediate appeal of this issue will effectively deprive them of a contractual right. 806 F.2d at 851.

Having contracted for a cruise which would begin and end in Italy, the parties also contracted that any lawsuits between them would likewise "begin and end" in Italy. The expectation, under the contract, was not only to create a venue in Italy but to create an *exclusive venue* there.

The Achille Lauro's Mediterranean cruises were marketed in over 15 countries on four continents. Of the 728 passengers aboard the vessel during the voyage in question, only 72 were Americans.

The selection of a forum by contract is an important contractual right which has been upheld by this Court. *Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 10 (1972). Its function within the maritime industry is to protect an international shipping concern from having to engage in litigation in multiple, distant jurisdictions.

As recognized by Justice Kennedy in his concurrence in *Stewart Organization, Inc. v. Ricoh Corporation* ____ U.S. ____ (1988) 56 U.S.L.W. 4659, forum selection clauses are important contractual rights which should, except in the most exceptional cases, be given controlling weight:

> "The federal judicial system has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time consuming pre trial motions. Courts should announce and encourage rules that support private parties who negotiate such clauses". id. at 4662

The Second Circuit, in opining that "the right to secure adjudication in a particular forum is not lost simply because enforcement is postponed," ignores the simple and compelling logic contained in *Farmland* and *Stewart*, supra.

The fundamental purpose of a forum selection clause is completely frustrated by a scheme that would require full adjudication on the merits before allowing an appeal of a decision denying enforcement of the clause. While the Second Circuit is technically correct when it contrasts forum selection clauses with constitutionally created rights, (Petition for Cert. at 12a), the purpose of the clause is similar to the purpose of qualified governmental immunity discussed in *Mitchell v. Forsyth* 472 U.S. 511 (1985).

In *Mitchell*, the Court held that a district court's denial of qualified governmental immunity is an order which can be immediately appealed under the *Cohen* Doctrine. Such an order would not be effectively reviewable after a trial on the merits because, held the Court, such immunity is intended to be an "immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." id. at 526.

A forum selection clause is similarly not merely a "defense to liability," but instead a contractual agreement that the parties will litigate any disputes within a particular forum. By selecting a particular forum, the parties renounce their rights to litigate in any other forum.

Hence, although not emanating from any statute or the common law, the right created by the contracting parties anticipates that they will both be immune from suit in a forum other than the one selected by them. It is not only that they will not be cast in damages in an inappropriate forum, but that they will not be called upon to litigate in such a forum.

Under *Cohen*, the concept of Section 1291 finality is to be given a "practical rather than a technical construction" 337 U.S. at 546. By disallowing an immediate appeal of the district court's order denying enforcement of the forum selection clause, the Second Circuit abandons this pragmatic approach.

In *Gillespie v. United States Steel Corp.* 379 U.S. 148, 152 (1964), this Court highlighted the practical nature of this inquiry, noting that "in deciding the question of finality the most important competing considerations are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other" (quoting *Dickinson v. Petroleum Conversion Corp.* 338 U.S. 507, 511 (1950)).

Although *Gillespie's* application should be limited to appeals of national significance, lest Section 1291 "be stripped of all significance", (*Coopers & Lybrand v. Livesay* supra., 437 U.S. at 477, note 30), we respectfully submit that there is national significance in having the United States courts avoid the burden of providing a forum to litigants who have agreed to air their disputes elsewhere. To require a full adjudication on the unrelated merits of a tort claim, before an appeal is allowed on the enforceability of a contractual forum selection clause, wastes precious judicial and legal resources and fails to provide a "practical construction" to the concept of Section 1291 finality.

CONCLUSION

The order of the District Court denying enforcement of the passage contract's foreign forum selection clause is immediately appealable as a collateral final order.

Respectfully submitted,

KIRLIN, CAMPBELL & KEATING
14 Wall Street
New York, New York 10005
Counsel for Respondents
Chandris Cruise Lines
Chandris (Italy) Inc.

On the brief:

Daniel J. Dougherty
Robert E. Higgins

No. 88-23 (8)

Supreme Court, U.S.
FILED
JAN 25 1989
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

v.

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, As Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

ARTHUR M. LUXENBERG
WILLIAM P. LARSEN JR.
Of Counsel as to all Respondents excepting Chandris, ABC & Crown

On The Brief
Jay D. Fischer
Jeffrey D. Marks
as to Klinghoffer Respondents only

FISCHER & KAGAN*
Wall Street Plaza
88 Pine Street, 25th Floor
New York, NY 10005
(212) 736-8185
Counsel for Respondents

MORRIS J. EISEN, P.C.**
233 Broadway
New York, NY 10279
(212) 341-8394
Counsel for Respondents

NEWMAN SCHLAU FITCH & BURNS, P.C.***
305 Broadway
New York, NY 10007
(212) 619-4350
Counsel for Respondents

Petition For Certiorari Filed July 6, 1988
Certiorari Granted October 11, 1988

1989

Respondents Ilsa Klinghoffer and Lisa Klinghoffer, as Co-Executrixes of the Estate of Leon and Marilyn Klinghoffer submit RESPONDENTS' BRIEF ON THE MERITS against Respondents Chandris Cruise Lines and Chandris (Italy) Inc. only.

All other Respondents submit RESPONDENTS' BRIEF ON THE MERITS against Petitioner Lauro Lines s.r.l., and Respondents Chandris Cruise Lines and Chandris (Italy) Inc.

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* Fischer & Kagan is Counsel of Record for Respondents Ilsa and Lisa Klinghoffer, as Co-Executrixes of the Estate of Leon and Marilyn Klinghoffer.

** Morris J. Eisen, P.C. is Counsel of Record for Respondents Sophie Chasser, Anna Schneider, Viola Meskin, Seymour Meskin, Sylvia Sherman, Paul Weltman and Evelyn Weltman.

*** Newman Schlau Fitch & Burns, P.C. is Counsel of Record for Donald E. Saire and Anna G. Saire.

QUESTION PRESENTED

Is an order of a United States District Court denying enforcement of a foreign forum-selection clause appealable as a collateral final order?

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No. 88-23

IN THE

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OCTOBER TERM, 1988

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Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, officially reported at 844 F.2d 50 (2d Cir. 1988), is printed in the Joint Appendix ("JA") at 3. The de-

cision of the United States District Court for the Southern District of New York dictated in open court on October 21, 1987 and entered on October 23, 1987, not officially reported, is printed at JA, 17.

JURISDICTIONAL STATEMENT

The Order below sought to be reviewed is dated April 7, 1988. It was entered April 7, 1988.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § § 1254(1) and 2101(c).

STATEMENT OF THE CASE

Petitioner Lauro Lines s.r.l. ("Lauro Lines") is the successor by merger to Achille Lauro de Altri-Gestione m/n "Achille Lauro" s.n.c. ("ALA") and Societa de Fatto Achille Lauro ed Altri-Gestione Armatoriali Nava Noleggiate ("FAL"), partnerships whose offices were located at Via C. Columbo 45, Naples, Italy. ALA owned the Italian-flag ACHILLE LAURO. Since February, 1982 both partnerships were in Italian reorganization proceedings. On July 28, 1986 all members of the Lauro group, including these partnerships, were merged into one company, i.e., Lauro Lines s.r.l. The merger was deemed retroactive to February, 1982.

On September 14, 1984, ALA time chartered the ACHILLE LAURO to a joint venture composed of FAL and Chandris S.A. (Piraeus). The Joint Venture operated the vessel as a cruise ship. Tickets were sold to passengers worldwide. Chandris S.A. (Piraeus) was responsible for the United States market. It retained Chandris, Inc. in New York to promote bookings and distribute tickets to interested travel agents, and others.

In October, 1985 the ACHILLE LAURO was hijacked by terrorists while on a cruise in the Mediterranean. The ticket held by each passenger contained 32 provisions. Among them was the following:

> Art. 31—VENUE OF JUDICIAL PROCEEDINGS—All controversies that may arise directly or indirectly in connection with or in relation to this passage contract, must be instituted before the judicial authority in Naples, the jurisdiction of any other authority being expressly renounced and waived . . .

Beginning in November, 1985 certain American passengers (and the representative of a deceased passenger) brought a series of suits in the United States District Court for the Southern District of New York against Lauro Lines, Chandris, and Crown Travel Service, Inc. ("Crown"). Jurisdiction was based upon diversity of citizenship, 28 U.S.C.A. § 1332.*

On November 17, 1986 Lauro Lines filed a motion for an order dismissing all actions against it on the grounds of lack of New York in personam jurisdiction, the ticket forum-selection clause, and forum non conveniens. Defendants Chandris and Crown joined the motion to dismiss on the basis of the forum clause. Plaintiffs in all actions opposed the motion.

On October 21, 1987 following oral argument, the District Court denied Lauro Line's motion. With respect to the forum-selection clause, the District Court stated, in part:

> I find that the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States. JA 20

On October 23, 1987 the Order denying enforcement of the forum clause was entered by the District Court.

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* The Chasser action (85 Civ. 9708) (diversity of citizenship); the Klinghoffer action (85 Civ. 9303) (diversity of citizenship and the Death on the High Seas Act, 28 U.S.C. 761 et seq.); the Saire action (86 Civ. 6332) (diversity of citizenship); the Meskin action (86 Civ. 4657) (no jurisdiction allegation in the Complaint).

On November 20, 1987 Lauro Lines filed its Notice of Appeal from that portion of the Order denying enforcement of the foreign forum-selection clause. Appellate jurisdiction was invoked under the collateral final order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) cert. granted, 336 U.S. 917 (1949). Chandris and Crown filed similar Notices of Appeal. All cases were consolidated for purposes of the appeal.

On January 29, 1988 plaintiffs filed a motion to dismiss the appeal for want of appellate jurisdiction.

On April 7, 1988 the United States Court of Appeals for the Second Circuit granted the motion for an order dismissing the appeal for lack of appellate jurisdiction.

> We reject Lauro's suggestion that the right granted in a forum-selection clause, if enforceable, must be vindicated immediately or it is lost. It is the right to have the binding adjudication of claims occur in a certain forum. . . . the right to secure adjudication in a particular forum is not lost simply because enforcement is postponed. *Chasser et al. v. Achille Lauro Lines et al.*, 844 F.2d 50, 55 (2d Cir. 1988).

The Second Circuit concluded that orders denying enforcement of foreign forum-selection clauses are not immediately appealable as collaterally final orders because "refusal to dismiss on forum-selection grounds is not effectively unreviewable on appeal from final judgment." *Chasser et al., supra*, at 53.

SUMMARY OF ARGUMENT

Title 28 United States Code § 1291 gives the Courts of Appeal jurisdiction to review final decisions of the District Courts. The collateral order doctrine is a narrow exception whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. *Helstoski v. Meanor*, 442 U.S. 500, 506-508 (1979); *Abney v. U.S.*, 431 U.S. 651, 660-62 (1977).

The narrowness of the collateral order doctrine is a clear indication of intentional judicial deference to the strong Congressional preference against piecemeal litigation. *Stringfellow v. Concerned Neighbors in Action*, 107 S.Ct. 1177, 1184 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 544 (1985). When as herein, an interlocutory order will be reviewable on appeal from final judgment, immediate review should not be granted simply because efficiency might be fostered, or because it may be difficult to persuade an appellate court to reverse after final judgment. *Stringfellow, supra; Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985).

It has been clearly established by the Second, Fifth and Seventh Circuits that the refusal to dismiss on forum-selection grounds is not effectively unreviewable on appeal from final judgment. *See Chasser, et al. v. Achille Lauro Lines, et al.*, 844 F.2d 50 (2d Cir. 1988); *Louisianna Ice Cream Distributors v. Carvel Corp.*, 821 F.2d 1031, 1032-34 (5th Cir. 1987); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 862 (7th Cir. 1984).

> The denial of the motion to dismiss on the basis of a contractual forum selection clause should not be differentiated from, and any less subject to correction upon final judgment appeal, than are denials of motions for dismissal on grounds of improper venue or of forum non conveniens. *Chasser et al., supra*, at 54.

The Third Circuit in *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 193-197 (3rd Cir. 1982) has

concluded otherwise due to a misplaced emphasis on 28 U.S.C. § 2105 which provides:

> there shall be no reversal in the Supreme Court or a Court of Appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

The Court in *Coastal Steel* assumed "matters in abatement" as used in 28 U.S.C. § 2105 to mean any non-jurisdictional ground for dismissal that would leave the parties free to pursue suit in another forum. The Court failed to consider that this would necessarily encompass motions to dismiss on grounds of forum non conveniens or improper venue, both of which are held to be reviewable upon final judgment. It is apparent that the definition used in the *Coastal Steel* decision was a means to reach a desired end. Upon further scrutiny, the use of this definiton is inconsistent with current appellate practice.

The Eighth Circuit addressed the appealability issue in *Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986) concluding that the refusal to dismiss on forum-selection grounds is effectively unreviewable on appeal from final judgment. However, the Court's reasoning, that a Missouri trial was not what was contemplated by the parties, effectively utilized the merits of the appeal to decide the appealability question. It becomes apparent that the Court used incorrect rationale to determine appealability in *Farmland*.

The extensive amount of judicial consideration given the enforceability question of forum-selection clauses (ie: number of pages in a contract, the placement of each phrase, and the size of the type utilized) clearly indicates that if a court has erroneously failed to support such a clause, it's order may be reversed upon appeal from final judgment. The right to secure adjudication in a particular forum is not lost simply because enforcement is postponed.

ARGUMENT

I. AN ORDER DENYING ENFORCEMENT OF A FORUM SELECTION CLAUSE IS NOT A COLLATERAL FINAL ORDER IMMEDIATELY APPEALABLE UNDER 28 U.S.C. § 1291.

Petitioner argues in essence that the Court's denial of the motion made for dismissal on forum-selection grounds is a final order insofar as it determines the forum where litigation will be conducted and that as such it is immediately appealable under 28 U.S.C. § 1291, as excepted by the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

While 28 U.S.C. § 1291 gives the Courts of Appeal jurisdiction to review all "final decisions" of the District Courts, a denial of a motion to dismiss has been consistently held not to be a final decision insofar as the denial leaves the controversy pending. *See Catlin v. United States*, 324 U.S. 229, 236 (1945). The collateral order doctrine is a narrow, judicially created exception to 28 U.S.C. § 1291, which in limited circumstances, allows an immediate appeal from orders which are collateral to the merits of the litigation and which cannot be adequately reviewed after final judgment.

In dispositive comment on the collateral order doctrine, this Court stated in *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 430-31 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)):

> "The collateral order doctrine is a "narrow exception". . . whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. See *Helstoski v. Meanor*, 442 U.S. 500, 506-508 (1979); *Abney v. Unites States*, 431 U.S. 651, 660-62 (1977). To fall within the exception, an order must at a minimum satisfy three conditions: it must "conclusively determine the disputed question", "resolve an important issue completely separate from the merits of the action", and "be effectively unreviewable on appeal from a final judgment."

The explicit narrowness of the collateral order doctrine is a clear indication of intentional judicial deference to the strong Congressional preference against piecemeal litigation, as well as a recognition that judicial efficiency will be fostered insofar as questioned interlocutory orders may become moot by the time final judgment is entered. *See Stringfellow v. Concerned Neighbors in Action*, 107 S.Ct. 1177, 1184 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 544 (1985). When, as herein, an interlocutory order will be reviewable on appeal from final judgment, immediate review should not be granted simply because efficiency might be fostered, or because it may be difficult to persuade an appellate court to reverse after final judgment. *See Stringfellow v. Concerned Neighbors in Action*, 107 S.Ct. 1177 (1987). As stated by the Court in *Richardson-Merrell Inc. v. Koller:*

> the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress. 472 U.S. at 436.

II. THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS ON THE QUESTION OF IMMEDIATE REVIEW OF DISTRICT COURT ORDERS DENYING ENFORCEMENT OF FORUM CLAUSES.

The Circuit Courts have split on the question presently before the court in both their opinions and supporting rationale. The most compelling view however, is that espoused by the Fifth, Seventh, and Second Circuits, which have clearly established that the refusal to dismiss on forum-selection grounds is not effectively unreviewable on appeal from final judgment, and as such, is not immediately appealable pursuant to the narrowly construed collateral order doctrine. *See Chasser, et al. v. Achille Lauro Lines, et al.*, 844 F.2d 50 (2d Cir. 1988); *Louisianna Ice Cream Distributors v. Carvel Corp.*, 821 F.2d 1031, 1032-34 (5th Cir. 1987); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 862 (7th Cir. 1984).

The Third Circuit has concluded otherwise due to a misplaced emphasis on 28 U.S.C. § 2105, which this Circuit has

erroneously concluded renders said refusals unreviewable on ultimate appeal from final judgment. *See Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 193-197 (3rd Cir. 1982). Title 28 U.S.C. § 2105 provides:

> there shall be no reversal in the Supreme Court or a Court of Appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

If this Congressional limitation is read literally the unqualified use of the words "no reversal" would effectively preclude interim review as well as review upon final judgment. The collateral order doctrine, which interprets finality within the meaning of 28 U.S.C. § 1291 would not apply in that it is concerned only with the timing of review. It assumes reviewability and focuses only on the difficulties raised by the postponement of review until final judgment. The collateral order doctrine has not, and cannot, be used to review at any time an order of a type that Congress has made unreviewable in principle.

It is evident that 28 U.S.C. § 2105 is not to be taken literally due to resulting inequities. The Court in *Coastal Steel* assumed "matters in abatement", as used in 28 U.S.C. § 2105, to mean any nonjurisdictional ground for dismissal that would leave the parties free to pursue suit in another forum. 709 F.2d at 196. However, this definition would necessarily encompass motions to dismiss on grounds of forum non conveniens or improper venue, both of which are held to be reviewable on appeal from final judgment. *See In re Air Crash Disaster*, , 821 F.2d 1147, 1166-68 (5th Cir. 1987) (reviewing denial of motion to dismiss for forum non conveniens); *Piper Aircraft Co. v. Reyno*, , 454 U.S. 235, 241 (1981) (review of grant of forum non conveniens motion); *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967) (review of denial of motion to dismiss for improper venue); *Corke v. Sameiet M.S. Song of Norway*, 572 F.2d 77 (2d Cir. 1978) (reviewing denial of motion to transfer venue).

It is apparent that the definition used in the *Coastal Steel* decision was a means to reach a desired end. Upon further scrutiny, the use of the above definition is inconsistent with current appellate practice.

The Eighth Circuit addressed the issue in *Farmland Industries Inc. v. Frazier-Perrott Commodities Inc.*, 806 F.2d 848 (8th Cir. 1986). The Court concluded that a District Court Order refusing to apply a forum-selection clause is immediately appealable. In examining whether a forum-selection clause will be effectively unreviewable on appeal, the Court explained:

> After a final determination is made on the merits it will be too late effectively to review the present order because the contractual right to trial in Illinois will have been lost. Granted, defendants could raise this issue after a final determination of the merits and possibly gain a new trial in Illinois. However, a Missouri trial and appeal is not what was contemplated by the parties when they signed the contract; what was contemplated is single trial resolution of disputes in Illinois. 806 F.2d at 851.

The Court specifically states that the defendants could raise the issue after a final determination on the merits and possibly gain a new trial. Further, the Court, by examining what was contemplated by the parties when they signed the contract, effectively utilized the merits of the appeal to decide the appealability question. It becomes apparent that the Court used incorrect rationale to determine appealability in *Farmland*.[1]

III. THE CONTENTION THAT THE RIGHT GRANTED IN A FORUM-SELECTION CLAUSE, IF ENFORCEABLE, MUST BE VINDICATED IMMEDIATELY OR IT IS LOST, LACKS MERIT.

[1] For additional decisions of the Third and Fourth Circuits, see *General Engineering Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352 (3rd Cir. 1986); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3rd Cir. 1987); *Hodes v. S.N.C. Achille Lauro*, Nos. 88-5086 slip op. (3rd Cir. September 22, 1988); *Sterling Forest Associates, Ltd. v. Barnett-Range Corp.*, 840 F.2d 249 (4th Cir. 1988).

A party resisting the enforcement of a forum-selection clause must show the clause to be unreasonable.

> The current facts indicate that the plaintiffs were not adequately directed to the terms inside the ticket by defendant. Whether a notice on the face of a ticket is sufficient to "draw the passengers attention to the conditions" within, and thereby incorporate those conditions into the ticket/contract, depends upon the particular circumstances of each case and the ticket involved. It is not uncommon for a Court in the process of scrutinizing a ticket (in order to determine a defendant carrier's motion to dismiss) to engage in consideration of such minutia as the shape of the ticket, how it is bound, the number of pages, the placement of each phrase, the size of the type utilized, the number of columns of print, the languages used and the color of paper and ink employed. *McQuillan v. Italia Societa Per Azione Di Navigazione*, 386 F.Supp. 462 (S.D.N.Y. 1974), aff'd, 516 F.2d 896 (2d Cir. 1975).

The extensive amount of judicial consideration given the enforceability question of forum-selection clauses clearly indicates that if a Court has erroneously failed to enforce such a clause, its order may be reversed upon appeal from final judgment. The right to secure adjudication in a particular forum, which is the goal of a forum-selection clause, is not lost simply because enforcement is postponed.

CONCLUSION

It is respectfully submitted that the Order of the United States Court of Appeals for the Second Circuit, dismissing for want of appellate jurisdiction the appeal of Lauro Lines from an Order of the United States District Court for the Southern District of New York denying enforcement of a foreign forum-selection clause, must be affirmed.

Dated: January 24, 1989

Respectfully submitted,

FISCHER & KAGAN
Wall Street Plaza
88 Pine Street
25th Floor
New York, NY 10005
(212) 736-8185

Counsel for Respondents

ARTHUR M. LUXENBERG
WILLIAM P. LARSEN JR.

Of Counsel

MORRIS J. EISEN, P.C.
233 Broadway
New York, NY 10279
(212) 341-8394

Counsel for Respondents

On The Brief

JAY D. FISCHER
JEFFREY D. MARKS

NEWMAN SCHLAU
FITCH & BURNS, P.C.
305 Broadway
New York, NY 10007
(212) 619-4350

Counsel for Respondents

No. 88-23

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

RAYMOND A. CONNELL*
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980
**Counsel of Record*
Attorney for Petitioner

JOHN R. GERAGHTY
LEROY LAMBERT
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980
Of Counsel

PETITION FOR CERTIORARI FILED JULY 6, 1988
CERTIORARI GRANTED OCTOBER 11, 1988

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Respondents.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ARGUMENT IN REPLY

INTRODUCTION

Petitioner's and Respondents' briefs ("PB" and "RB," respectively) indicate agreement on the applicable legal principles and authorities. They also indicate there is no substantial dispute that the order below satisfies two of the three prongs of the test for determining whether an order is appealable prior to judgment. Disagreement centers on the test's third prong, i.e., whether a district court's order denying enforcement of a Forum Clause can be "effectively reviewed" on appeal.

Petitioner submits that such an order cannot be effectively reviewed on appeal, and the United States Courts of Appeal for the

Third, Fourth and Eighth Circuits agree.[1] See PB at 32 and 36-39. By contrast, only the Second Circuit below agrees with Respondents[2]. The decisions from the Fifth

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[1] Hodes v. S.N.C. Achille Lauro, 858 F.2d 905 (3rd Cir. 1988), petition for cert. filed (U.S. Dec. 21, 1988) (No. 88-1036); In re Diaz Contracting, Inc., 817 F.2d 1047, 1048 (3rd Cir. 1987); General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 355-56 (3rd Cir. 1986); Coastal Steel v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 195-97 (3rd Cir. 1983), cert. denied 464 U.S. 938 (1983); Sterling Forest Associates, Ltd. v. Barnett-Range Corp., 840 F.2d 249, 253 (4th Cir. 1988); Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 850-51 (8th Cir. 1986).

[2] Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir. 1988).

and Seventh Circuits are equivocal.[3] See PB at 33-36.

Moreover, there is a strong federal policy, especially in maritime cases, favoring enforcement of forum selection clauses. A finding of immediate appellate review furthers this policy; a finding denying immediate appellate review undermines the policy, and, as a practical matter, leaves enforcement to the discretion of the district courts.

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[3] Louisiana Ice Cream Distributors, Inc. v. Carvel Corp., 821 F.2d 1031 (5th Cir. 1987); Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860 (7th Cir. 1984), cert. denied, 469 U.S. 890 (1984).

I. REPLYING TO RESPONDENTS' POINTS I AND III, AN ORDER DENYING ENFORCEMENT OF A FOREIGN FORUM SELECTION CLAUSE IS EFFECTIVELY UNREVIEWABLE ON APPEAL.

The test for determining whether an order which does not end the litigation is immediately appealable is three-pronged. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). First, the order must conclusively determine the disputed question; second, it must resolve an important issue completely separate from the merits of the action; and third, it must be "effectively unreviewable on appeal from a final judgment." Coopers & Lybrand, supra, at 468.

The first and second prong of the test for immediate appellate review are "met easily" by orders refusing enforcement of

forum selection clauses. Sterling Forest Associates v. Barnett Range Corp., 840 F.2d 249, 253 (4th Cir. 1988). Implicitly conceding this, Respondents focus on the third prong by contending: "The right to secure adjudication in a particular forum, which is the goal of a forum selection clause, is not lost simply because enforcement is postponed." RB at 11. This contention was adopted below by the United States Court of Appeals for the Second Circuit: "[T]he right to secure adjudication in a particular forum is not lost simply because enforcement is postponed." Chasser v. Achille Lauro Lines, 844 F.2d 50, 52 (2d. Cir. 1988).

However, the very purpose of a forum clause is not simply to ensure a trial at the selected forum before the chosen tribunal. It is to ensure a single trial in one forum to the exclusion of all others. PB at 30, 38. The efficacy of forum clauses in commercial agreements of all sorts, especially those involving international trade and commerce, is dependent upon prompt, reliable enforcement. A trial outside the agreed forum, followed by an appeal and yet another trial - this time before the proper tribunal - is not what a forum clause contemplates. See Hodes v. S.N.C. Achille Lauro, 858 F.2d 905, 913 (3d Cir. 1988), petition for cert. filed, (U.S. Dec. 21, 1988) (No. 88-1036). A trial in the wrong

forum will have already been had, and no appeal can rectify that. See Abney v. United States, 431 U.S. 651 (1977); Helstoski v. Meanor, 442 U.S. 500 (1979); see also Mercantile National Bank v. Langdeau, 371 U.S. 555, 558 (1963) (§ 1257 certiorari jurisdiction).

As put by the United States Court of Appeals for the Eighth Circuit:

> From a practical viewpoint the district court's order denying application of the clause will be unreviewable after final judgment. After final determination is made on the merits it will be too late effectively to review the present order because the contract and right to trial in Illinois will have been lost. Granted, defendants could raise the issue after a final determination on the merits and possibly gain a new trial in Illinois. However, a Missouri trial and appeal is not what was contemplated by the parties when they signed the contract; what was contemplated is single trial resolution of disputes in Illinois. Denying defendants immediate appeal of this issue will effectively deprive them of a contractual right.

Farmland Industries v. Frazier-Parrott Commodities, 806 F.2d 848, 850-51 (8th Cir. 1986).

Despite this Court's decision in The Bremen, 407 U.S. 1 (1972), a reluctance to enforce forum clauses persists. See Sterling Forest Associates v. Barnett-Range Corp., 840 F.2d 249, 252 (4th Cir. 1988) ("We think evidence of a continuing hostility to forum selection clauses is apparent not only in the district court's egregious misinterpretation of the clause at issue herein, but also in

the manner in which the district court's holding was arrived at.").

The order below satisfies the three pronged Coopers & Lybrand test, fits neatly into the "small class" of exceptions to the final judgment rule recognized in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), and the right to immediate appellate review is in keeping with the strong federal policy favoring enforcement of forum selection clauses. The Fourth Circuit put it best. Appellate review may not await a judgment on the merits - "the time to do it is now." 840 F.2d at 253.

II. REPLYING TO RESPONDENTS' POINT II, THE DECISIONS OF THE THIRD, FOURTH, AND EIGHTH CIRCUITS ARE MORE PERSUASIVE THAN THE DECISION BELOW.

The decisions of the Fifth and Seventh Circuits in Louisiana Ice Cream, supra, and Rohrer, Hibler, supra, relied on by Respondents (RB at 8), involved domestic forum clauses. In Rohrer, Hibler, where the issue was whether the case would be tried in the United States District Court for the Northern District of Illinois or the Circuit Court of Cook County, the Court indicated an order refusing enforcement of a foreign forum clause would qualify for immediate appellate review. Rohrer, Hibler, 728 F.2d at 864. In Louisiana Ice Cream the question of forum clause enforcement was "inextricably

intertwined with the merits." 821 F.2d at 1033.

By contrast, the decisions of the Courts of Appeal relied on by Petitioner squarely find that orders denying enforcement of forum clauses are the proper subject of an immediate appeal. See supra, at n.1. The Hodes decision from the Third Circuit is based on the same cruise, ticket, and forum clause as here.

Respondents' criticism of Coastal Steel, supra (RB at 8-10), is based upon the Third Circuit's discussion of 28 U.S.C. § 2105. However, that discussion demonstrates the difficulty parties aggrieved by District Court orders refusing enforcement of forum clauses will experience in obtaining

effective appellate review after judgment. In any event, consideration of § 2105 is not necessary to a holding that orders denying enforcement of forum selection clauses are immediately appealable as collaterally final orders under Cohen. E.g., Farmland Industries, supra, and Sterling Forest Associates, supra.

CONCLUSION

The Order of the United States Court of Appeals for the Second Circuit dismissing for want of appellate jurisdiction the appeal of Lauro Lines from an Order of the United States District Court for the Southern District of New York denying enforcement of a foreign forum selection clause should be

reversed. The matter should be remanded to the United States Court of Appeals for the Second Circuit for determination of Petitioner's appeal.

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Respectfully submitted,

RAYMOND A. CONNELL
Attorney for Petitioner
29 Broadway
New York, New York 10006
(212) 943-3980
Counsel of Record

John R. Geraghty
LeRoy Lambert
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980

Of Counsel